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No. 91-

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

VICTOR STEPHENS,
Petitioner,
—against—
THE STATE OF ALABAMA,
Respondent.

On Writ of Certiorari To The Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI AND APPENDICES A–C

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July 8, 1991

Questions Presented

1. Should certiorari be granted where the Alabama Supreme Court has upheld the imposition of the death penalty by a trial judge, where neither the trial judge, the Alabama Supreme Court, nor the Alabama Legislature has prescribed a standard for the making of such decision in the face (as here) of a jury recommendation of a life sentence, especially where there are conflicting decisions of the Florida and Indiana Supreme Courts, effectively holding that the *Tedder* standard approved by this Court is required under the U.S. Constitution, and that a sentence of death following a jury recommendation of life can be sustained only if the facts suggesting the sentence of death are so clear and convincing that virtually no reasonable person could differ?

2. Should certiorari be granted, petitioner's conviction vacated, and the case remanded to the Alabama Supreme Court for reconsideration in light of this Court's recent decision in *Cage v. Louisiana* because the trial court charged the jury that to acquit petitioner it must have an actual and substantial doubt as to his guilt and to find him guilty it must be morally certain of his guilt?

3. Should certiorari be granted, petitioner's murder conviction vacated, and the case remanded to the Alabama Supreme Court for further consideration based on this Court's recent decision in *Schad v. Arizona* because the trial court failed to charge the jury on the lessor included offense of

felony–murder (a non–capital offense in Alabama) in violation of petitioner's Fourteenth Amendment rights?

4. Should certiorari be granted because the prosecution's use of 21 out of 23 of its peremptory challenges to exclude black jurors constituted a violation of the principle established by this Court in *Batson v. Kentucky*?

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II. Certiorari should be granted, petitioner's conviction should be vacated, and the case should be remanded to the Alabama Supreme Court for reconsideration in light

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of this court's recent decision in *Cage v. Louisiana* because the trial court charged the jury that to acquit petitioner it must have an actual and substantial doubt as to his guilt and to find him guilty it must be morally certain of his guilt. 11

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No. 91

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

VICTOR STEPHENS,

Petitioner,

-against-

THE STATE OF ALABAMA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioner respectfully requests that a writ of certiorari be issued to review a decision of the Supreme Court of Alabama, entered on March 15, 1991, which affirmed both petitioner's convictions for robbery and murder, and his death sentence on the murder counts, and to review a subsequent decision of the Supreme Court of Alabama, entered on April 11, 1991, which denied reconsideration of its first decision. Petitioner respectfully submits that the issuance of a writ of certiorari is

provident both because the Alabama courts here decided important questions of federal law which should be decided by this Court, and because they have decided federal questions in a way which conflicts with applicable decisions of this Court and other courts. *See* Supreme Court Rule 10(1)(b) and (c).

Opinions Below

The opinions of the Alabama Supreme Court, as well as the opinions of the Alabama Court of Criminal Appeals and the Hale County, Alabama Circuit Court, are reprinted respectively in Appendices A, B and C to this petition.

Jurisdiction

This court has jurisdiction to review the decision of the Alabama Supreme Court pursuant to 28 U.S.C. § 1257(a).

Constitutional Provisions Involved

This case involves the Fifth Amendment to the United States Constitution which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation;

the Sixth Amendment to the United States Constitution which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense;

the Eighth Amendment to the Constitution which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the United States Constitution which provides in relevant part:

> Section 1 – All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Procedural History

On December 17, 1987, petitioner, Victor R. Stephens, was convicted in the Hale County, Alabama, Circuit Court of two counts of robbery and murder. R.165. As required by Alabama law, a sentencing hearing was held on the capital convictions, and, after due deliberation, the jury recommended a sentence of life imprisonment without parole. On July 24, 1989, the trial court overrode the jury's recommendation, and sentenced petitioner to death. In overriding the jury verdict, the trial court did not (and under the Alabama Supreme Court's interpretation of the Federal Constitution was not required to) apply a standard requiring that the facts suggesting a sentence of death be so clear and convincing that no reasonable person could differ.

Petitioner appealed both his conviction and his sentence to the Alabama Court of Criminal Appeals and then to the Alabama Supreme Court, asserting, *inter alia*, that numerous constitutional violations occurred both during his trial and at his sentencing. Both courts affirmed his conviction and death sentence. Following the denial of a motion for reconsideration by the Alabama Supreme Court, Victor Stephens now files the present petition for certiorari.

Facts

On January 20, 1986, a robbery occurred at Bailey's Grocery Store in Hale County, Alabama. During this robbery, the owner of the store, James R. Bailey, and another man, Adam Pickens, were shot and killed.

Later that evening, petitioner sought treatment for a shotgun wound to his left hand at the Bowden Area Hospital in Carroll County, Georgia. Petitioner was subsequently arrested at the hospital, and extradited to Alabama to stand trial for the crimes of which he was later convicted. Record [hereinafter R.] at 39; R.670 reproduced in Appendix [hereinafter App.] D at 52.

At trial, there was evidence putting petitioner and another man, Christopher L. (Peabody) Starks at the crime scene. R.30, App. D at 6; R.37, App. D at 13–14; R.619, App. D at 25–26.[1] However, there was a substantial dispute as to the role played by each. The state took the position that petitioner was intimately involved in all aspects of the crime. R.82–83; R.422–23. Victor Stephens took the position that Starks went into the store to rob it, while he, Stephens, waited outside; that after some time had gone by, he entered the store to see what had happened, not intending to kill anyone, only to walk head on into some shotgun blasts fired by Mr. Bailey; and that he then fired back, essentially in self–defense. R.30, App. D at 6–7; R.37, App. D at 13–14; R.626, App. D at 33; R.670, App. D at 52.[2]

Reasons for Granting The Writ

Certiorari should be granted in the present case for four reasons. First, there is a split between the Supreme Court of Alabama on the one hand, and the Supreme Courts of Florida and Indiana on the other, as to what standard, if any, is

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1. Starks was also convicted of murder, but was sentenced to prison, not death. Trial documents at 178, App. D at 55.

2. The trial court overruled the jury verdict of a life sentence despite this evidence, and despite the fact that Starks was not sentenced to death.

constitutionally required to be applied by a court in overruling a jury verdict of life imprisonment in favor of a death sentence. Of all the states which permit capital punishment, only Alabama, Florida and Indiana permit a judicial imposition of a death sentence after a jury has found a sentence of life imprisonment to be appropriate.[3] However, the Supreme Courts of Florida and Indiana have found that the Federal Constitution precludes a judge from doing so unless the facts suggesting a sentence of death are so clear and convincing that no reasonable person could differ. The Supreme Court of Alabama has decided, to the contrary, that no particular standard is required to be used in overriding a jury's verdict in favor of life imprisonment.

Additionally, certiorari should be granted, petitioner's convictions vacated, and the case remanded to the Supreme Court of Alabama for further consideration in light of this court's recent decisions in *Cage v. Louisiana* and *Schad v. Arizona*. Finally, certiorari should be granted because a violation of *Batson v. Kentucky* took place at petitioner's trial.

I. CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS A CONFLICT BETWEEN HOLDINGS OF THE FLORIDA AND INDIANA SUPREME COURTS ON THE ONE HAND AND THE ALABAMA SUPREME COURT ON THE OTHER AS TO WHETHER A JUDGE MAY CONSTITUTIONALLY OVERRIDE A JURY VERDICT RECOMMENDING A SENTENCE OF LIFE IMPRISONMENT IN SITUATIONS WHERE NEITHER THE *TEDDER* STANDARD REQUIRING THAT THE FACTS

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3. Four other states allow a judge to sentence a defendant to life imprisonment after a jury has recommended a death sentence.

SUGGESTING A SENTENCE OF DEATH BE SO CLEAR AND CONVINCING THAT NO REASONABLE PERSON COULD DIFFER NOR ANY OTHER STANDARD IS APPLIED.

Of all the states which permit capital punishment, only three, Alabama, Indiana, and Florida, allow judicial override of jury recommendations of life sentences in favor of the death penalty. *See Spaziano v. Florida*, 468 U.S. 447, 463 & n.9 (1984). Both the Indiana and Florida Supreme Courts have limited judicial discretion to do the same, however, by adopting, after finding that the Federal Constitution requires it, what is known as the *Tedder* standard,[4] pursuant to which the judge may not override unless the facts suggesting a sentence of death are so clear and convincing that no reasonable person could differ. *Martinez Chavez v. Indiana*, 539 N.E.2d 4, 5 (Ind. 1989); *Tedder v. State*, 322 So.2d 908 (Fla. 1975).[5]

Moreover, this Court, in upholding Florida's capital punishment scheme against Sixth, Eighth and Fourteenth Amendment challenges,[6] has repeatedly relied on the fact that Florida has adopted the *Tedder* standard. For example, in

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4. *Tedder v. State*, 322 So.2d 908 (Fla. 1975).

5. Although these courts did not specifically state that they were basing their holdings on Federal Constitutional law, neither did they indicate that they were basing their holdings on state law. As such, this Court's decision in *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983), requires that the decisions be treated as resting on federal law.

6. Florida's capital punishment scheme is the only capital punishment scheme where judicial override of jury recommendations of life sentences are permitted to have been upheld by this Court as not violative of the Constitution.

Spaziano v. Florida, 468 U.S. 447 (1984), this Court rejected a challenge to the Florida standard for allowing a trial court to override a jury's recommendation of life, noting that "[t]his court already has recognized the significant safeguard the *Tedder* standard affords a capital defendant in Florida ... [and] [w]e are satisfied the Florida Supreme Court takes that standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role." *Id.* at 465 (citations omitted).[7]

Similarly, in *Dobbert v. Florida*, 432 U.S. 282 (1977), this Court noted:

> Perhaps most importantly, the Florida Supreme Court has held that the following standard must be used to review a trial court's rejection of a jury's recommendation of life:
>
> "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So.2d 908, 910 (1975) (emphasis added) (cited with approbation in *Proffitt v. Florida*, 428 U.S. at 249).
>
> This crucial protection demonstrates that the new statute affords significantly more safeguards to the defendant than did the old. Death is not automatic,

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7. Two Justices of this Court have gone so far as to indicate that this Court *held* in *Spaziano* that a *Tedder* type standard is required. *See Schiro v. Indiana*, 475 U.S. 1036, 1038–39 (1986) (Brennan J. and Marshall J. dissenting from the denial of petition for certiorari) (this Court in its *Spaziano* decision upholding the Florida provisions allowing judicial override of jury verdicts for life sentences explicitly relied on the fact that Florida had adopted the *Tedder* standard).

> absent a jury recommendation of mercy, as it was under the old procedure. A jury recommendation of life may be overridden by the trial judge only under the exacting standards of *Tedder*.

Id. at 295–96. *See also Proffitt v. Florida*, 428 U.S. 242, 249–50 (1976) (plurality opinion) (to the same effect).

The Alabama Supreme Court, by contrast, has found in both the present and other cases that the Federal Constitution and Alabama law permit judicial overrides of jury verdicts recommending life sentences in situations where the facts suggesting a sentence of death are not so clear and convincing that no reasonable person could differ.[8] *Ex Parte Hays*, 518 So.2d 768, 775–76 (Ala. 1986) *cert. denied* 108 S. Ct. 1099 (1988); *Hadley v. State*, 575 So.2d 145, 159 (Ala. Ct. Crim. App. 1990). Thus, the Alabama Supreme Court's holdings *vis a vis* the Federal Constitution are in direct contravention of numerous opinions of the Florida Supreme Court, the Indiana Supreme Court, and quite arguably of this Court.[9]

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8. Not only has Alabama failed to adopt a *Tedder* type standard, but it has not adopted any specific standard to be used in judging the deference to be accorded a jury verdict recommending a life sentence, and the propriety of a court's override of a jury verdict in favor of the same. *See e.g. In re Tarver*, 553 So.2d 633, 634–35 & n.1 (Ala. 1989) (Maddox J. concurring) *cert. denied* 110 S. Ct. 1837 (1990). It is respectfully submitted that this failure of the Alabama Courts to provide any standard to be used in determining the deference to be accorded the jury's recommendation of a life sentence makes the Alabama death penalty scheme arbitrary and capricious in violation of *Gregg v. Georgia*, 428 U.S. 153, 188–89 (1976).

9. Alabama is, as a result, the only State in which a court may, without applying any standards, override a jury's decision recommending a life sentence, and instead impose a sentence of death. It is respectfully submitted that this violates the spirit of the Sixth Amendment's guarantee to criminal defendants of

The split between Supreme Court of Alabama holdings that do not require the *Tedder* standard to be applied in judicial overrides, and those of the Florida and Indiana Supreme Court, as well as this Court, indicating that such a standard is constitutionally required, has resulted in great uncertainty as to what the Sixth, Eighth and Fourteenth Amendments require. It also appears to have resulted in numerous petitions for certiorari being filed with this Court over the years. *See Freeman v. State*, 555 So.2d 215 (Ala. 1989) *cert. denied* 110 S. Ct. 2604 (1990); *Ex Parte Hays*, 518 So.2d 768, 775–76 (Ala. 1986) *cert. denied* 108 S. Ct. 1099 (1988); *Harrell v. State*, 470 So.2d 1303, 1309 (Ala. Ct. Crim. App. 1984) *cert. denied* 474 U.S. 935 (1985); *Crowe v. State*, 485 So.2d 351, 364 (Ala. Ct. Crim. App. 1985) *cert. denied* 477 U.S. 909 (1986).

It is respectfully submitted that the granting of certiorari in the present case presents an excellent opportunity for this Court to end the confusion surrounding this issue, and finally resolve the dispute as to whether a *Tedder* type standard is required by the Constitution in judicial override cases.[10]

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a right to have their fate decided by a jury of their peers. It is hard to believe that when Alexander Hamilton wrote in Federalist No. 83 (Modern Library Ed. at 543) that trial by jury in criminal cases was a protection against the judicial despotism imposed, *inter alia*, by arbitrary punishment, that he conceived of a system wherein a judge could set aside a jury's decision that an offense should not entail capital punishment.

10. Victor Stephens' counsel raised this issue both at trial and on his appeal to the Alabama appellate courts, thus making it appropriate for this court to consider the issue. R.909–10, App. D at 57–59; App. D at 70, 85; App. D at 90–92. Nor can such error be considered harmless, *Chapman v. California*, 386 U.S. 18 (1967), since it is respectfully submitted that the facts in this case suggesting a sentence of death are not so clear and convincing that no reasonable person could differ. And at all events, should the issue arise, the Alabama Supreme Court should, on remand, have the opportunity to make such a harmless error determination in the first instance. *See Lee v. Illinois*,

II. CERTIORARI SHOULD BE GRANTED, PETITIONER'S CONVICTION SHOULD BE VACATED, AND THE CASE SHOULD BE REMANDED TO THE ALABAMA SUPREME COURT FOR RECONSIDERATION IN LIGHT OF THIS COURT'S RECENT DECISION IN *CAGE V. LOUISIANA* BECAUSE THE TRIAL COURT CHARGED THE JURY THAT TO ACQUIT PETITIONER IT MUST HAVE AN ACTUAL AND SUBSTANTIAL DOUBT AS TO HIS GUILT AND TO FIND HIM GUILTY IT MUST BE MORALLY CERTAIN OF HIS GUILT.

At petitioner's trial, the trial court violated his Due Process rights by using evidentiary presumptions in the jury charge that had the effect of relieving the state of its burden of proof beyond a reasonable doubt as to each essential element of the crimes of which he was convicted.[11]

This term this Court decided a case almost exactly on point. *Cage v. Louisiana*, 59 U.S.L.W. 3361 (Nov. 13, 1990) (per curiam). In *Cage*, this Court summarily reversed a conviction where the trial court had improperly instructed the jury on

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476 U.S. 530, 547 (1986).

11. Again, counsel for Victor Stephens raised this issue both at trial and before the Alabama appellate courts, thus making it appropriate for this court to consider it. R.807–08, App. D at 95–97; *see* App. D at 110. Also, it is once again suggested that the facts in this case were such, particularly since they came down to a determination over the respective roles of Victor Stephens and Christopher Starks, that such error was not harmless. *Chapman v. California*, 386 U.S. 18 (1967).

the element of reasonable doubt. The instruction under review in *Cage* provided:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrated a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.

Cage, 59 U.S.L.W. at 3361.

This Court concluded that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by Due Process. It wrote:

> It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Id.

At Victor Stephens' trial, the trial court used almost exactly the words that *Cage* held are commonly understood to denote a higher degree of doubt. The trial court stated that "the doubt which would justify an acquittal must be *an actual and substantial doubt.*" R.832, App. D at 117–18 (emphasis added). The court told the jury that it need only have *"an abiding conviction of the truth of the charge."* R.832, App. D at 118 (emphasis added). In addition, the court, at several points, equated beyond a reasonable doubt with *"to a moral certainty."* R.833, App. D at 118 (emphasis added).

As a result of these erroneous jury instructions, the jury could have found Victor Stephens guilty without "reaching a subjective state of certitude", *Johnson v. Louisiana*, 406 U.S. 356, 360 (1972), and therefore could have found him guilty on a degree of proof below that required by Due Process.

Because of the similarity between *Cage* and the present case, it is respectfully submitted that certiorari should be granted, Victor Stephens conviction vacated, and the case remanded to the Alabama Supreme Court for reconsideration in light of *Cage*.[12]

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12. Alternatively, this Court could consider granting certiorari and summarily reversing petitioner's conviction as it did in *Cage*.

III. CERTIORARI SHOULD BE GRANTED, PETITIONER'S CONVICTION SHOULD BE VACATED, AND THE CASE SHOULD BE REMANDED TO THE ALABAMA SUPREME COURT FOR FURTHER CONSIDERATION BASED ON THIS COURT'S RECENT DECISION IN *SCHAD V. ARIZONA* BECAUSE THE TRIAL COURT FAILED TO CHARGE THE JURY ON FELONY MURDER (A NON-CAPITAL OFFENSE) IN VIOLATION OF PETITIONER'S FOURTEENTH AMENDMENT RIGHTS.

At petitioner's trial, the trial court violated his Due Process rights by failing to give a jury charge for the lesser included offense of felony murder,[13] thus creating the possibility that the jury may have believed him only guilty of felony murder, but voted for a capital conviction rather than allow petitioner to be punished only for a robbery or manslaughter conviction.[14]

Earlier this term this Court reaffirmed that, in capital cases, the jury must be given the opportunity to convict a defendant of a lesser included offense in any case in which "the evidence warrants such an instruction", and that failure to give

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13. At Alabama law, a felony murder is not a *capital* murder for which the death penalty may be imposed, *Russaw v. State*, 572 So.2d 1288, 1292 (Ala. Ct. Crim. App. 1990), Ala. Code § 13A-6-2; 13A-5-40(b), App. E at 2-5, and therefore, is a lesser included offense of capital murder.

14. Counsel for Petitioner raised this issue in the lower court, R.781-82, App. D at 137-138, as well as before the Alabama Supreme Court. App. D at 92-95.

the jury such an opportunity violates the capital defendant's Fourteenth Amendment Due Process rights. *Schad v. Arizona*, 59 U.S.L.W. 4762 (June 21, 1991). *See also Hopper v. Evans*, 456 U.S. 605, 610 (1982) (same); *Beck v. Alabama*, 447 U.S. 625, 627 (1980) (same). A lesser included instruction is required whenever "the evidence would permit a jury rationally to find a defendant guilty of the lesser offense and and acquit him of the greater." *Hopper v. Evans*, 456 U.S. at 612 (citation omitted).

This occurred in the present case because, while the State introduced overwhelming evidence of a robbery, and evidence connecting petitioner to that robbery, there was also substantial evidence that the killings were the *unintended* consequence of one of the victims drawing and firing a shotgun.[15] This evidence included three statements of the defendant which the state presented to the jury. In the first statement, given on January 23, 1986, Mr. Stephens stated that it was Stark's idea to rob the store, that he did not know who had shot first, Starks or the store–owner, but that when he entered the store "he was shot by one of the men in the store with a shotgun." R.619, App. D at 25. He also related that he was high on cocaine and LSD prior to the robbery and therefore could not remember all of the details. R.619, App. D at 25. In the second statement, which was given on January 25, 1986, and read to the jury, Mr. Stephens stated:

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15. An accused is entitled to a lesser included instruction regardless of whether the State or the defendant offers the evidence supporting the lesser included offense. *Hopper v. Evans* 456 U.S. at 611–12; *Ex Parte Pruitt*, 457 So.2d 456, 457 (Ala. 1984) (per curiam). In addition, if "the defendant denies the charge but the evidence presented by the State suggests a reasonable theory supporting a charge on a lesser offense, the trial court is obliged to give a charge on the lesser offense when requested." *Ex Parte Pruitt* at 457.

> I just walked into the store after Peabody [Starks] went in. He had been in a while so I went in to see what was happening. When I walked in, the white man started shooting with a shotgun. I just pulled out my pistol and started shooting. We left and came back to Georgia.

R.626–27, App. D at 33. And in the third statement, given on January 28, 1986, and also read to the jury, Mr. Stephens explained:

> After we came across a long bridge in Alabama, Peabody kept saying, 'he needed some money.' After we crossed the bridge, we pulled over to this store to get gas. Peabody said 'he needed some money.' I told him I had enough money to get us home.
>
> When we pulled up to the gas pump a white man came out and pumped us $10 worth of gas. I asked the man if he had a bathroom and he said 'no.' I got back in the truck and smoked a cigarette. Peabody went into the store. He stayed [in] the store a long time and I walked up to the store and opened the door, then this white man shot me in the hand. I fell to my knees and pulled my gun (.25 cal. automatic) out of my right rear pocket and started shooting. I don't even know if I shot anybody or not. The white man was standing to my left when he shot me with the shotgun. Peabody came running by me yelling 'let's go, let's go.' We ran out and jumped in the truck. I didn't make it in time.

R.669–70, App. D at 52.

This evidence clearly supported a theory of felony–murder. In fact, the evidence of an unintentional killing was so strong that the court actually instructed the jury on the affirmative defense of self–defense. R.829–30, App. D at

115–116. However, the court decided not to instruct on felony–murder because the State convinced the court that there is no difference between intentional murder during a robbery and felony–murder. R.782, App. D at 138 ("[t]hey don't have to come in with intent to kill them and rob them"). Of course there was a crucial difference, since felony murder is not a capital offense.

Because of the recent reaffirmance of the *Hopper* and *Beck* holdings in *Schad*, it is respectfully submitted that certiorari should be granted, Victor Stephens conviction vacated and the case remanded for further consideration in light of *Schad*.[16]

IV. CERTIORARI SHOULD BE GRANTED BECAUSE THE PROSECUTOR'S USE OF 21 OUT OF 23 PEREMPTORY CHALLENGES AGAINST BLACK JURORS VIOLATED THE PRINCIPLE OF LAW SET OUT BY THIS COURT IN *BATSON V. KENTUCKY*.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court held that a prosecutor could not use peremptory challenges to exclude members of minority groups from a jury. The burden of establishing racial bias is initially on the party alleging discriminatory use of the peremptory challenges, who must establish a *prima facie* case. *Id.* at 93. The burden then switches to the state, which must articulate a clear, specific, nondiscriminatory reason for peremptorily challenging each minority juror. The trial court has broad discretion in accepting or rejecting these reasons. *Hernandez v. New York*, 59 U.S.L.W. 4501, 4505 (May 28, 1991).

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16. Alternatively, this Court could consider granting certiorari and summarily reversing petitioner's conviction.

In the present case, the trial court, after counsel for petitioner raised the issue, App. B at 6–7; App. D at 144, found a *prima facie Batson* violation had been made out, but accepted the prosecution's explanations for its peremptory challenges of black jurors.[17] However, review of the reasons the prosecution gave for challenging some of the jurors makes clear that the trial court abused its discretion by accepting them.

For example, the state asserted that it was excluding three black jurors, Ms. E. Williams, Ms. A. Harms, and Ms. Hayes because they knew too much about the case, while it excluded black juror Ms. Shelton for knowing too little about the case. Additionally, the prosecution did not peremptorily challenge Mr. Corley, a white juror who stated that he knew *nothing* about the case. App B at 152. *See* R.159.

The State's exclusion of three black jurors for knowing too much about the case, while another black juror was excluded for knowing too little, particularly when a white juror who knew nothing about the case was not challenged, makes clear that the trial court's acceptance of the State's *Batson* reasons was an abuse of discretion.

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17. Petitioner also raised this issue before the Alabama Supreme Court. App. D at 65–68; App. D at 89–90.

Conclusion

For the various reasons given, Victor Stephens' petition for certiorari should be granted.

Respectfully submitted,

July 8, 1991

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APPENDIX A

SUPREME COURT OF ALABAMA

October Term, 1990–91

1900032

Ex parte Victor R. Stephens

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Victor R. Stephens

v.

State)

(Hale Circuit Court, CC–89–34)

PER CURIAM.

Pursuant to Rule 39(c), Ala. R. App. P., we granted the defendant's petition to review the judgment of the Court of Criminal Appeals affirming his conviction and sentence of death. *Stephens v. State*, [Ms. 2 Div. 738, Aug. 3, 1990] __ So. 2d __ (Ala. Crim. App. 1990). After considering the record of trial, the Court of Criminal Appeals' opinion, and the briefs and arguments of the parties, we find no basis for reversal of the judgment of the Court of Criminal Appeals.

AFFIRMED.

Hornsby, C.J., and Maddox, Almon, Shores, Adams, Houston, Steagall, Kennedy, and Ingram, JJ., concur.

APPENDIX B

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1989–90

2 Div. 738

Victor R. Stephens

v.

State
Appeal from Hale Circuit Court
(CC–86–34)

TAYLOR, PRESIDING JUDGE

The appellant, Victor R. Stephens, was convicted of both counts of an indictment charging him with a capital offense involving the robbery and murder of James R. Bailey, in violation of § 13A–5–40(a)(2), *Code of Alabama* 1975, and a capital offense involving the robbery and murder of Adam Pickens, also in violation of § 13A–5–40(a)(2). Following a sentence

hearing, the jury recommended a sentence of life imprisonment without possibility of parole. The trial court, after complying with §13A–5–47, *Code of Alabama* 1975, sentenced the appellant to death by electrocution.

The bodies of James R. Bailey and Adam "Pop" Pickens were discovered at Bailey's Grocery Store on Alabama Highway 14 in the Wedgeworth community near Sawyerville, in Hale County, Alabama, on January 20, 1986. Mr. Bailey, age 72, the owner of the store, was found dead inside the store — apparently of multiple gunshot wounds. Adam Pickens, age 83, was still alive, but also suffering from multiple gunshot wounds. Mr. Pickens was taken to Druid City Hospital in Tuscaloosa, Alabama, where doctors attempted to save his life. However, Mr. Pickens died while in surgery.

The evidence as presented by the State tended to establish that Mr. Bailey and Mr. Pickens were last seen alive by Mr. Bailey's daughter–in–law Sandra Bailey. Ms. Bailey "ran down" to her father–in–law's store between 4:25 and 4:30 p.m. on January 20 to purchase a gallon of milk before the store closed for the day. Sylvester Jackson came to the store between 4:30 and 5:00 p.m. to buy some gasoline for his car. After pumping the gas, Mr. Jackson entered the store to pay for the gas. He observed both victims lying on the floor. Mr. Jackson ran out of the store and rushed home to tell his mother what he had seen. His mother called the sheriff's department and told them what her son had seen.

Shortly thereafter, Hale County Sheriff H.C. Colvin, Alabama Bureau of Investigation investigator C.W. Gibson, and Alabama Department of Forensic Sciences crime scene examiner John McDuffie arrived at the store to begin their

investigation and to collect any evidence which might assist them in discovering the identity of the person or persons who shot the two men. The examination of the store revealed that Mr. Bailey was robbed of money and food stamps and that Mr. Bailey had fired his .20 gauge shotgun at the robbers. Adam Pickens was unarmed. Mr. Bailey was found in the middle of the store still clutching his shotgun. Mr. Bailey had apparently been shot in a different location inside the store as there was a trail of blood leading to Bailey's body. Further examination of the scene revealed that one individual—later determined to be the appellant—had been hit by the shotgun blast as blood was found near the front door together with a .25 caliber automatic pistol. A number 8 shotgun pellet was removed from the barrel of the weapon.

Further investigation revealed that Carrie Ingram and Sheila Kennedy were walking along Alabama Highway 60 in Akron late on the afternoon of January 20, 1986. The two women were walking in the oncoming traffic lane--approximately 6 miles from Bailey's store— when they were met by a small black pickup truck traveling at a high rate of speed. The truck was proceeding in a direction away from Bailey's store. The women noticed that the passenger in the truck was black and that he appeared to be slumped over in the seat. Linda Johnson and her son Kevin also saw the black pickup on Highway 60 that afternoon. According to Ms. Johnson, she was preparing to turn left from Highway 60 onto County Road 45 when she looked into her rear–view mirror and noticed a black pickup truck coming up behind her at a high rate of speed. Despite the fact that Ms. Johnson had turned on the vehicle's left–turn signal, the truck showed no sign of reducing its rate of speed. Fearing a collision, Ms. Johnson stopped her vehicle and allowed the truck to overtake her before she completed her left turn. Although she could not identify the make of the truck or who was driving it, her son Kevin readily

identified it as a black Nissan pickup truck and told authorities that he had observed two black males inside the truck.

Pursuant to the information received from various witnesses and the evidence collected at the scene, the Hale County Sheriff's Department issued a regional teletype advising law enforcement agencies to "be on the lookout" for two males, armed, one possibly injured. The teletype also requested that these agencies check area clinics and hospitals for persons with possible gunshot wounds. On Tuesday, January 21, 1986, Georgia Bureau of Investigation agent Charles Stone and ABI agent Ed Traylor advised the Hale County Sheriff's Department that both subjects were in custody in Carroll County, Georgia. Further information from Georgia officials revealed that Christopher L. Starks was apprehended in possession of a .32 caliber pistol and that the appellant, Victor R. Stephens, was treated for a shotgun wound to his left hand at the Bowdon Area Hospital in Carroll County, Georgia, on Monday evening January 20, 1986.

On Wednesday, January 22, 1986, a black Nissan pickup truck owned by Christopher L. Starks, a co–defendant, was searched by law enforcement agencies. Found in the vehicle were blood stains on the passenger's seat and three (3) one–dollar denomination "food stamps" which had been issued from food stamp offices in Hale County and Tuscaloosa County, Alabama. Also taken from the glove compartment of the truck were identification papers belonging to the appellant, Victor R. Stephens.

A series of statements were taken by law enforcement officials from the appellant while he was in the custody of Georgia officials. These statements were taken orally on

January 23, 25, and 28, 1986. The gist of the three statements revealed that appellant and Christopher "Peabody" Starks, left Georgia on Saturday, January 18, 1986, and traveled to New Orleans, Louisiana, where they remained until Monday, January 20, 1986. On Monday, while Stark was driving through Alabama on the way back to Georgia, the two men decided they needed some money. According to the appellant, Starks suggested that they find someplace to rob. They went into a store in Alabama occupied by an elderly white man— subsequently identified as James R. Bailey — and an elderly black man — subsequently identified as Adam Pickens. "Peabody" entered the store and displayed his weapon, while the appellant guarded the entrance. After the appellant and Starks obtained the contents of the store's cash register, they started to leave. At this time, Mr. Bailey pulled out a shotgun and fired it. Pellets from the shotgun shell struck the appellant in the left hand. It was then that the appellant "emptied" his .25 caliber pistol. According to the appellant, Starks was armed with either a .22 or .32 caliber pistol. Appellant admitted leaving his .25 caliber automatic pistol at the store. The two men then got back into their truck and drove back to Georgia.

Autopsies were performed on both victims. The results revealed that James R. Bailey died as a result of multiple gunshot wounds to the face, chest, abdomen, and hand. Two expended .32 caliber bullets and one .25 caliber bullet were removed from Mr. Bailey's body. Adam's Picken's autopsy revealed that he died from four separate gunshot wounds to the back. All four expended bullets recovered from Pickens's body were .25 caliber bullets. The seven expended bullets removed from the victims (three from Bailey, four from Pickens) were sent to the Alabama Department of Forensic Sciences for examination. Forensic firearm examiner Lawden Yates examined each of the seven bullets. His examination revealed that the two .32 caliber bullets removed from Mr. Bailey's body

were fired from the same .32 caliber pistol found on the person of Christopher Starks at the time of his arrest. The five .25 caliber bullets removed from the victims (one from Mr. Bailey, four from Mr. Pickens) were fired by the .25 caliber automatic pistol that was left at the store by the appellant. Shotgun pellets removed from Stephens's hand at the Bowdon Area Hospital in Carroll County, Georgia, were compared with shotgun pellets removed from the store and the barrel of the .25 caliber gun. The analysis revealed all to be number 8 shotgun pellets, consistent with the type shell recovered from Bailey's weapon. This concluded the State's evidence.

The only evidence presented by the defense was in the form of testimony from Jessie Portis. Mr. Portis testified that he arrived at Bailey's store after Mr. Bailey and Mr. Pickens were shot. He leaned down and asked Mr. Pickens if he could say what color vehicle the robbers were in. According to Mr. Portis, Mr. Pickens responded that the robbers were in a red vehicle. When asked if the robbers were white or black, Mr. Pickens stated, "white."

I

Stephens, a black male, was tried by a jury composed of 7 white jurors and 5 black jurors following the prosecution's use of 21 of its 23 peremptory challenges to eliminate black potential jurors. Appellant's defense counsel timely objected to the composition of his client's jury based on the State's alleged discriminatory use of its peremptory challenges, in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and *Ex parte Branch*, 526 So.2d 609 (Ala. 1987). Finding that the defense had established a prima facie case of racial discrimination, the trial court required the prosecution to

state the reasons for its strikes, and the following reasons were given:

1. *Mr. Mickens*— expressed serious reservations about imposing the death penalty.

2. *Ms. Ball*—expressed serious reservations about imposing the death penalty.

3. *Mr. Ball*—answered prosecutor's question concerning previous knowledge or association with illegal drugs, indicating that he, some member of his family, or a close friend had been involved with illegal drugs; his son had been in "some serious trouble" dealing with drugs and/or other criminal activity; also indicated he did not wish to serve on a jury.

4. *Mr. Patton*—affirmatively answered prosecutor's question concerning previous knowledge or association of any type of criminal offense; further investigation revealed that he had been convicted of night hunting and DUI.

5. *Ms. Hood*—asked to be excused from jury duty and "had quite a bit to say about lack of transportation and inability to get here and she was concerned and wouldn't be able to pay attention, etc."; husband was prosecuted and served time in jail for failure to pay court-ordered child support.

6. *Ms. Holifield*—prior arrests for writing "worthless checks and similar type offenses on several different occasions."

7. *Ms. C. Harris*—young, single, and unemployed; brother a defendant in a criminal prosecution.

8. *Ms. Spence*—sons had been involved in "some very serious criminal offenses."

9. *Ms. Johnson*—had been a defendant in small claims court and been served with numerous civil suits; appeared to be extremely responsive to the defendant's questions; also, the fact that she was chewing gum was felt to indicate her lack of respect for the seriousness of the proceedings.

10. *Ms. Cottrell*—asked to be excused from jury duty; also indicated in response to prosecutor's question that she, or someone very close to her, had been charged with some criminal offense.

11. *Mr. Pratcher*—although his permanent legal residence was in Hale County, he was currently living and working in Atlanta, Georgia; seemed to be interested in not serving on a jury; also was wearing sunglasses in the courtroom; also, at some time during voir dire proceedings, sat next to or appeared to have some sort of relationship with a juror excused for cause because of his views against capital punishment.

12. *Ms. Lewis*—single and unemployed; her son had been involved in some sort of "death or killing."

13. *Ms. Shelton*—prosecution found it "extremely strange" that every juror from her small community except her had heard something about the crime since it occurred in that community; also very insistent about giving her marital status as separated.

14. *Ms. E. Williams*—seemed to be very familiar with the facts of the case; indicated during voir dire that she was well aware that one of the victims had lived long enough to make a dying declaration.

15. *Ms. B. Wilson*—county sheriff was acquainted with juror and recommended that she be struck because she was "extremely anti-establishment" and because of belief that her husband had been involved in some type of criminal activity.

16. *Ms. A. Harris*—young, single, and unemployed; knew nothing of the facts surrounding the case.

17. *Mr. K. Williams*—general appearance was very rough and unkempt; also, like Juror Pratcher, appeared to be involved with a juror struck for cause because of his views against capital punishment.

18. *Ms. Brown*—husband a homicide victim; however, sheriff's department was

concerned about her as a juror because of her belief that her husband's case had been mishandled.

19. *Ms. Hayes*—seemed totally removed from the situation; felt that this might indicate animosity on her part, since she worked at the nursing home where the wife of one of the victims now lived.

20. *Ms. Hobson*—asked to be excused from jury duty; felt that this, along with fact that she had an invalid husband and a house damaged in the previous night's storm, might affect her concentration on the case.

21. *Ms. S. Harris*—relatives had been in trouble with the law.

The prosecutor's remaining two peremptory challenges were used to remove two white male jurors from the jury venire. The reasons given for these two jurors was that one "had been in criminal trouble and had been prosecuted at some point in time: and the other had a cousin that had been involved in some type of criminal activity. Defense counsel challenged the prosecutor's reasons for several of his strikes, alleging:

> "MR. MORRIS [defense counsel]: Judge, I'm not sure that I have any cross. I would make it known for the record on I think there were three people that they mentioned and that was Mr. Williams, Mr. Pratcher, and a Mr. Pratcher. Mr. Kenneth Williams and Mr. Willie Pratcher and one other individual that I believe the District Attorney alluded to as sitting

near or being around Mr. Gray. I would make it known to the Court, I believe the Court would recall that during yesterday's continuous voir dire that lasted into the night, Mr. Gray was an occupant on the front row with a Mr. Corley sitting on one side and a Mr. Collins sitting on the other. Both of whom were white. To my knowledge, there was not another black individual on the front row yesterday. So I would differ with the information of the State in that regard. Now the information that the District Attorney has concerning things like they had some relatives involved in some crimes, being in small claims court where they've been sued, matters like this, in light of the — the fact that the State said they didn't respond to any questions or didn't seem to know anything about it, we contend that the jurors by comparison that were left on this case knew nothing about it. Starting with Mr. Grinstead, Mrs. Fondren, Mr. Corley, also responded that they knew nothing about it. A Mrs. Lyles responded that she knew something about it. She was left. A black female. Now Mrs. Marks responded that she knew something about it, a black female. A Mr. Ryans responded that he knew something about it, a black male. A Mrs. Travis responded that the knew something about it, a black female. Mrs. Williams responded that she knew something about it, a black female, and our contention is that it's clear that the fact that someone knows nothing about it played on part and we contend that it was strictly on the basis of race in this matter.

"As to Mrs. Ruby Lee Brown, she stated in voir dire that her husband was a victim of a homicide

and that the victim was prosecuted and there would be no other — I believe she also responded — I believe she had a bumper sticker — I take that back, Your Honor. That's not true. I'm saying that there would be no reason in the world that I can think of why she would not be an excellent juror other than race. She was struck.

"Further, we contend that the last four strikes that they enumerated, starting with Mrs. Brown, are vague and very indecisive answers. For instance, Mrs. Hayes, number 19 strike, number 40 on the venire list, stated that she knew Mrs. Bailey and that she knew her and knew her daughter and had an association with Mrs. Bailey who's in the nursing home where she's employed as well as knew her daugher well. No conceivable reason that the defense can find, no conceivable reason that she would not make an excellent juror for the State, other than the fact that she's black.

"Now there's vague allegations on number 43, they say that her husband had been in some sort of problem. Mrs. Hobson, we contend that's just a smoke screen there. And then one of the persons up here, he had some sunglasses on. The defense contends certainly that is no justifiable reason. Now that's all I have."

The prosecutor responded as follows:

"MR. GREENE: Our only response is that one of the first things as to Mr. Gray, it was reported to us and made quite some concern as to Mr. Gray this morning concerning who he might talk to. Now this is the information we got from

the people we asked to try to pay attention. Now Mr. Williams, Gray, Patton and Pratcher, were sitting together this morning in the back of the courtroom. We felt that that might be a matter of concern. We point out for the record that the last, I think, five strikes for the State involved two white males we thought we had some problems with and three black females that we were concerned about. We also thought these three black females might make us good jurors, but we had reason, we felt, overrode our desires to retain them.

"I think that's all.

"THE COURT: Is it your testimony as an officer of this Court that the reasons for striking were non–racial and not based upon the race of any particular juror?

"MR. GREENE: It is, Your Honor. I think the jurors we have before us bears that out. There's black males serving, some five blacks in total. We have an abundance of females on this jury in a capital murder case. I think we've got a jury that well reflects, based upon peoples backgrounds, Your Honor, and on that basis, a fair racial mixture of males and females, black and white, in this community. We arrived at this through exhaustive and argumentative process."

Thereafter, the trial court found that appellant's *Batson* motion was not well–taken, and overruled the motion.

In reviewing this issue, we find particularly helpful this Court's recent decision *Warner v. State*, [Ms. 3 Div. 945, February 23, 1990] __So.2d__ (Ala. Cr. App. 1990). In *Warner*, Judge Bowen, writing for the Court, stated:

> "A prosecutor may not use peremptory jury strikes in a racially discriminatory manner. *Batson*, supra. The principles of *Batson*, as interpreted by the Alabama Supreme Court, are set out in *Ex parte Branch*, 526 So.2d 609 (Ala. 1987), and *Harrell v. State*, [Ms. 88–1226, November 9, 1989] 555 So.2d 263, 265 (Ala. 1989) ('We take this opportunity to clarify the *Batson* analysis.'). Applying those principles to the facts of this case, we find that the tenets of *Batson* and *Branch* have been minimally satisfied.
>
> "In *Harrell v. State*, 555 So.2d at 268, n. 1, the Alabama Supreme Court noted:
>
> > "'"There are many possible reasonable explanations for such strikes [of blacks by the prosecution]. *Batson* demands that such strikes be related to the case to be tried and not be related to the defendant's and the jurors' shared race. *Batson*, 476 U.S. 79, 97–98 (1986). In a given case, the following factors may be relevant and may suffice to defeat the defendant's prima facie case:
> >
> > > "'"1. Age, fringe religious beliefs, body english, handwriting, and name association in certain instances. *Tolbert v. State*, 315 Md. 13, 553 A.2d 228 (1989); *Chambers v. State*, 724 S.W.2d 440 (Tex.Ct.App. 1987).

"'2. Demeanor of the juror. *United States v. Forbes*, 816 F.2d 1010 (5th Cir. 1987).

"'3. Fact that prospective juror, like defendant, may be young, single, and unemployed; fact that prospective juror was struck because divorced and of low income occupation, in favor of a professional, married person; avoidance of eye contact with prosecutor. *United States v. Cartlidge*, 808 F.2d 1064, 1070–71 (5th Cir. 1987).

"'From a consideration of these factors it is clear that the explanation need not rise to the level of a challenge for cause. *Batson*, 476 U.S. at 97. However, a clear, reasonable explanation for the strike must be given. *Ex parte Branch*, 526 So.2d 609, 623–24 (Ala. 1987).'"

"In *Grandison*, 885 F.2d at 147, it was observed: 'Although the presence of minorities on the jury does not mean that a *Batson* prima facie case cannot be made,... the fact that the jury included two black jurors is significant.' We find other observations of the court in *Grandison* applicable here.

"'No per se rule exists to establish a prima facie case of purposeful discrimination. [*United States v.] Lane*, 866 F.2d [103], 107 [(4th Cir. 1989)]; *United States v. Sangineto–Miranda*, 859 F.2d 1501, 1521 (6th Cir. 1988); *United States*

v. Montgomery, 819 F.2d 847, 851 (8th Cir. 1987); [*United States v.] Clemons*, 843 F.2d[741], 746 [(3d Cir. 1988)]. *But see United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987). Nor does a prosecutorial checklist exist to avoid the inference of discriminatory practices. "The Supreme Court's mandate in *Batson* to consider all the facts and circumstances means that we cannot lay down clear rules as to [what] ... will constitute or refute a prima facie case." *Sangineto–Miranda*, 859 F.2d at 1521.

"'....

"'A prima facie case of discrimination does not arise "every time a prosecutor strikes a black prospective juror." *Lane*, 866 F.2d at 105. Numerous valid factors may influence a prosecutor to strike a particular potential juror, including "current and past employment, general appearance and demeanor, previous jury service, and the absence or presence of apparent prejudice." *Id.* at 106. While prosecutors may not challenge prospective jurors because of their race, they may exercise their peremptory challenges "'for any reason at all, as long as that reason is related to [their] view concerning the outcome' of the case to be tried." *Batson*, 476 U.S. at 89, 106 S.Ct. at 1719, *quoting United States v. Robinson*, 421 F.Supp. 467, 473 (D.Conn. 1976), *mandamus granted sub. nom. United States v. Newman*, 549 F.2d 240 (2d Cir. 1977). Peremptory challenges have long been exercised to ensure both parties the existence of a fair and impartial jury; the usefulness of this device could be undermined by restrictive appellate rule–making.

Id at 147, 149."

__So.2d at __.

Just as in *Warner*, we find that the tenets of *Batson* and *Branch* have been minimally satisfied.

The fact that a prospective juror has reservations about imposition of the death penalty may constitute a race–neutral reason for the exercise of a peremptory strike. *Warner*, *supra*; *Smith v. State*, 531 So.2d 1245, 1247–48 (Ala. Cr. App. 1987); *Levert v. State*, 512 So.2d 790, 795–96 (Ala. Cr. App. 1987). Thus, the prosecutor's use of peremptory challenges to remove Mr. Mickens and Ms. Ball (numbers 1 and 2) from appellant's jury were entirely proper.

Connection with or founded suspicion of criminal activity can also constitute a sufficiently race–neutral reason for the exercise of a peremptory challenge. *Warner*, *supra*; *Power v. State*, 548 So.2d 590, 592–93 (Ala. Cr. App. 1988), *aff'd on other grounds*, 548 So.2d 605 (Ala. 1989); *Lynn v. State*, 543 So.2d 704, 709 (Ala. Cr. App. 1987), *aff'd*, 543 So.2d 709 (Ala. 1988) *cert. denied*, __ U.S. __, 110 S.Ct. 351, 107 L.Ed.2d 338 (1989); *Ward v. State*, 539 So.2d 407, 408 (Ala. Cr. App. 1988); *Avery v. State*, 545 So.2d 123, 126 (Ala. Cr. App. 1988); *Lewis v. State*, 535 So.2d 228, 232 (Ala. Cr. App. 1988); *Currin v. State*, 535 So.2d 221, 223 (Ala. Cr. App.), *cert. denied*, 535 So.2d 225 (Ala. 1988). This connection with or suspicion of criminal activity includes not only the juror in question, but also relatives and close friends of the juror. *United States v. Forbes*, 816 F.2d 1006, 1010 (5th Cir. 1987); *Scales v. State*, 539 So.2d 1074, 1074–75 (Ala. 1988); *Lynn v. State*, *supra*, 543 So.2d at 709; *Avery v. State*, *supra*, 545 So.2d at

136; *Ward v. State*, *supra*, 539 So.2d at 408; *Lewis v. State*, *supra*, 535 So.2d at 232. Thus, the prosecutor's use of peremptory challenges to remove Mr. Ball, Mr. Patton, Ms. Holifield, Ms. C. Harris, Ms. Spence, Ms. Cottrell, Ms. Lewis, Ms. B. Wilson, and Ms. S. Harris (numbers 3, 4, 6–8, 10, 12, 15, and 21) from appellant's jury was also proper.

Likewise, the fact that child support proceedings have been brought against a juror or someone closely connected with that juror has been held to be a race–neutral reason for the exercise of a peremptory challenge. *Warner v. State*, *supra*, __ So.2d at __; *Lynn v. State*, *supra*, 543 So.2d at 709; *Currin v. State*, *supra*, 535 So.2d at 223. Thus, the prosecutor's removal of Ms. Hood (number 5) from the jury ws proper based on this ground.

A hostile attitude toward law enforcement or dissatisfaction with the police has also been upheld as a sufficiently race–neutral explanation for the use of a peremptory challenge. *Warner v. State*, *supra*, __ So.2d at __; *Powell v. State*, *supra*, 548 So.2d at 593. Thus, the prosecutor's removal of Ms. Brown (number 18) was proper.

The fact that a prospective juror, like a defendant, is young, single, and unemployed is also a sufficiently race–neutral reason for the exercise of peremptory challenges, since such jurors may identify with the defendant. Young, single, and unemployed jurors may also be struck in favor of professional, married persons. *Harrell v. State*, 555 So.2d 263, 268 n. 1 (Ala. 1989); *Harris v. State*, *supra*, 545 So.2d at 147; *Currin v. State*, *supra*, 535 So.2d at 223. Thus, the prosecutor's removal of Ms. C. Harris and Ms. A. Harris (numbers 7 and 16) was proper. We would also note that Ms. C. Harris was

also properly removed because of the fact that her brother was a defendant in a criminal prosecution as discussed above.

Likewise, the demeanor of a juror can also provide a sufficiently race–neutral explanation for a prosecutor's use of a peremptory challenge. *Harrell v. State*, *supra*, 555 So.2d at 268 n. 1; *Warner v. State*, *supra*, __ So.2d at __. *See also United States v. Forbes*, *supra*, 816 F.2d at 1010. Demeanor, the way in which a person behaves or conducts himself, can include a number of characteristics, such as the desire not to serve as a juror, disinterest in the proceedings as a whole, inattentiveness exhibited by talking with others during voir dire, perceived hostility in answering prosecution questions, perceived favoritism toward the accused, or simply a general lack of respect for the proceedings which could be exhibited by such behavior as chewing gum, wearing sunglasses, hats, excessive jewelry, or inappropriate clothing while inside the courtroom. *See Harrell v. State*, 555 So.2d at 268 n. 1; *Harris v. State*, *supra*, 545 So.2d at 147; *Currin v. State*; *supra*, 535 So.2d at 223. *See also Lockett v. State*, 517 So.2d 1346 (Miss. 1987) *cert. denied*, 487 U.S. 1210, 108 S.Ct. 2858, 101 L.Ed.2d 895 (1988) (wearing of hat, hostility toward prosecution, desire not to serve because of invalid parent); *Taitano v. Commonwealth*, 4 Va.App. 342, 358 S.E.2d 590 (1987) (age, dress, demeanor); *Chambers v. State*, 724 S.W.2d 440 (Tex.Ct.App. 1987) (age, body english); *Townsend v. State*, 730 S.W.2d 24 (Tex.Ct.App. 1987) (inattentiveness); *Smith v. State*, 734 S.W.2d 694 (Tex.C.App. 1987) (excessive jewelry). Thus, the prosecutor's removal of Ms. Johnson, Mr. Pratcher, Mr. K. Williams, Ms. Hayes, and Ms. Hobson (numbers 9, 11, 17, 19, and 20) was proper. We would note, however, that we have grave reservations concerning the prosecutor's desire to strike jurors Pratcher and Williams based on their proximity to another juror who had expressed his opposition to the death penalty.

The fact that a juror is overly familiar with the facts of a case has been held sufficiently race–neutral to satisfy a reviewing court. *See Harris v. State, supra*, 545 So.2d at 147. Thus, it was proper for the prosecutor to remove Ms. E. Williams (number 14) based on her familiarity with this case, particularly because of her knowledge that one of the victims made a dying declaration — an essential part of the defendant's case. It is only logical that a prosecutor would wish to strike a juror who had indicated that she would place a great deal of importance in a piece of evidence crucial to the theory of defense.

Finally, the fact that a prosecutor distrusts a juror or finds his responses not to be credible has also been held to be a sufficiently race–neutral reason for using a peremptory challenge. *Rodgers v. State*, 725 S.W.2d 477, 480 (Tex.Ct.App. 1987). As the prosecutor explained, he found the fact that Ms. Shelton (number 13), a resident of the community in which the crime had occurred, had absolutely no knowledge of the crime "extremely strange" in light of the fact that every other juror from that particular community had heard of the incident. We find this to be a sufficiently race–neutral reason. While members of the jury venire from other parts of Hale County might not have heard of this incident, we likewise find it extremely strange that a resident of such a small community would have absolutely no knowledge of an incident of this magnitude which occurred in her own back yard.

' "[T]he vagarious process of choosing jurors need not be controlled by a simple equation; it may be influenced by intuitive assumptions that are not fatally suspect merely because they are not quantifiable, *see [United States v.] Forbes*, 816 F.2d [1006] at 1010–11 [(5th Cir. 1987)], and by interplay of various factors, *see United States v. Lewis*, 837 F.2d 415, 417 n. 5 (9th Cir. 1988) [cert]. *denied*, __ U.S. __, 109 S.Ct. 304,

102 L.Ed.2d 323 (1988)]." *Warner v. State*, *supra*, __ So.2d at __, *quoting United States v. Lance*, 853 F.2d 1177, 1181 (5th Cir. 1988). While this Court has concern about several of the reasons articulated by the prosecutor for the exercise of his peremptory jury challenges, we find that, as a whole, the prosecutor provided sufficiently race–neutral reasons for the exercise of those challenges.

> " 'In reviewing the trial court's finding that the strikes were nondiscriminatory, we can only reverse if we find that that determination was clearly erroneous.' *Williams*, 548 So.2d at 504. Accord, *Ex parte Branch*, 526 So.2d at 624. ' "In a *Batson* context, the Supreme Court observed that because the trial judge's findings 'largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.' *Batson*, 476 U.S. at 98, n. 21." ' *Owens v. State*, 531 So.2d 22, 23 (Ala.Cr.App. 1988), quoting *State v. Antwine*, 743 S.W.2d 51, 66 (Mo. 1987), cert. denied, __ U.S. __, 108 S.Ct. 1755, 100 L.Ed.2d 217 (1988). 'In reviewing the lower court's ruling, we have been mindful that it is not our function to decide this issue *de novo*, to "duplicate the role of the lower court." ' *Owens*, 531 So.2d at 24. The finding of the trial judge 'is entitled to considerable deference on appeal.' *Harrell*, __ So.2d at __. See also *Scales v. State*, 539 So.2d 1074, 1075 (Ala. 1988). ('[W]e are convinced that the trial judges in our system are in a much better position than appellate judges to decide whether the truth has been stated')."

Warner v. State, *supra*, __ So.2d at __. Just as in *Warner*, we find the trial court's ruling was not clearly erroneous. Accordingly, no reversal is warranted.

II

Appellant next contends that the trial court erred in denying his motion for mistrial based upon the prosecutor's comments during closing argument that defense counsel was attempting to hide evidence from the jury. We would first note that we have thoroughly examined the portion of the record that contains the closing arguments of counsel and we can find no instance—either during closing arguments or at the conclusion of said arguments— where defense counsel moved for a mistrial. Moreover, appellant's brief fails to specify exactly which portion of the prosecutor's argument was erroneous. Since, however, defense counsel objected to but one portion of the State's closing arguments, we will examine that portion of the State's closing argument.

At the close of the evidence, the prosecutor made his first closing argument, to which defense counsel made no objections. Defense counsel then made his closing argument, during which he attempted to poke holes in the State's case by raising questions concerning the credibility of the State's evidence and the failure of the State to present certain evidence. After defense counsel made his closing argument, the prosecutor made his final closing argument to the jury. He argued, in pertinent part, as follows:

> "The Defense attorney says, Oh, well, you know, all these policemen got there and they forced him to confess. Now wait a minute, folks, you read what the man said. He said over and over if they're going to force him to confess, if they're going to make it up, how about let's add a few more good facts that would make it nicer to read. He doesn't have him saying that it was somebody else's idea and somebody shot at me and I just shot back. Let's not say that. Let's don't say that

I went in there and shot the man because I'm a cold–blooded killer, well, obviously, he didn't put that in there because they took down what the man told him. You can't add and you can't take away. It's their job and they're trained that way. We come up here and every one of these cases over and over and over again, and what we get tried is that they tried to try the policemen. They said he did everything wrong. They also try to throw smoke at you and cover up all the evidence and point you off in some direction out yonder. They don't think you've got sense enough to hear what is going on up here.

"MR. MORRIS: I object. The jury has got fine sense. I resent that the District Attorney is making any reference to the fact that I don't think the jury has got good sense.

"MR. GREENE: I've got every right to comment on the evidence.

"THE COURT: This is argument of counsel. Continue.

"MR. GREENE: Mr. Morris stood up here in the course of this trial and threw smoke at you every way he could. Now why is he doing that? Well, obviously any report about anybody with a shot hand anywhere around here was going to be looked into. That's clear as a bell. But you're supposed to think that it's somebody else. Now what does the evidence connect to? It connects to Stephens."

When determining whether a prosecutor's statement requires reversal

> "...'it must be examined in its context and in light of what had transpired, that is, in light of preceding argument of defense counsel, to which the prosecutor's argument was an answer.' *Washington v. State*, 259 Ala. 104, 65 So.2d 704 (1953); *Gibson v. State*, 347 So.2d 576 (Ala. Crim. App. 1977); *Rutledge v. State*, [Ms. 5 Div. 610, August 16, 1983] (Ala. Crim. App. 1983). The rule in Alabama is that 'remarks or comments of the prosecuting attorney, including those which might otherwise be improper, are not grounds for reversal when they are invited, provoked, or occasioned by accused's counsel and are in reply to or retaliation for his acts and statements.' *Shewbart v. State*, 33 Ala. App. 195, 32 So.2d 241, cert. denied, 249 Ala. 572, 32 So.2d 244 (1947); *Camper v. State*, 384 So.2d 637 (Ala. Cr. App. (1980); *Wilder v. State*, 401 So.2d 167 (Ala. 1981), cert. denied, 454 U.S. 1057, 102 S.Ct. 606, 70 L.Ed.2d 595 (1981); *Miller v. State*, 431 So.2d 586 (Ala. Crim. App. 1983); *Rutledge*, supra."

Henderson v. State, 460 So.2d 331, 333 (Ala. Cr. App. 1984). *See also United States v. Robinson*, 485 U.S. 25, 108 S.Ct. 864, 99 L.Ed.2d 23 (1988); *Cason v. State*, 515 So.2d 721, (Ala. Cr. App.), *cert. denied*, 515 So.2d 725 (Ala. 1987).

In *Dossey v. State*, 489 So.2d 662, 665 (Ala. Cr. App. 1986), Judge Bowen, writing for this court, stated as follows:

"The prosecutor has a right to comment on and answer statements made by defense counsel in argument to the jury. *Dollar v. State*, 26 Ala. App. 361, 159 So. 704 (1935); *Moragne v. State*, 16 Ala. App. 26, 28, 74 So. 862, 864; reversed on other grounds, 200 Ala. 689, 77 So. 322 (1917). Counsel should be afforded wide latitude in responding to assertions made by opposing counsel in previous argument. *York v. State*, 34 Ala.App. 188, 190, 39 So.2d 694, 696 (1948), cert. denied, 252 Ala. 158, 39 So.2d 697 (1949). 'Wide latitude is given the solicitor in making reply to argument previously made by appellant's counsel.' *Moody's v. State*, 40 Ala. App. 373, 374, 113 So.2d 787, 788 1959). '[W]ide latitude is given a district attorney in making reply in kind,... and the propriety of argument of counsel is largely within the trial court's discretion.' *Jettson v. State*, 435 So.2d 167, 171 (Ala. Cr. App. 1983)."

Our examination of the record convinces this Court that the prosecutor was merely replying in kind to arguments made by defense counsel. During his argument to the jury, defense counsel made many disparaging references to the strength of the State's case. He attacked the State's evidence, particularly the failure by State experts to be able to positively identify whether the type B bloodstains found at the scene of the crime could have come from only the appellant and no other person. Defense counsel also questioned the State's failure to introduce certain evidence, namely a hat and gloves recovered during the course of the investigation. He pointed out to the jury the inability of ballistics experts to positively identify the shotgun pellets removed from appellant's hand as having come from the victim's shotgun. Defense counsel further pointed out that appellant's fingerprints were never found at the scene of the crime, not even on the .25 caliber automatic pistol that he admitted owning. Following these statements, defense counsel then told the jury that "I want the man [referring to the

prosecutor] who's got the last shot to tell you about this too." Defense counsel's statement was a clear invitation to the prosecutor to reply to his statements, which he did. As seen above, the essence of the State's final closing argument was that defense counsel was trying to throw the jury off by pointing them in other directions than at his client. The prosecutor merely responded to defense counsel's previous argument. Accordingly, his comments do not warrant reversal.

"Moreover, statements of counsel in argument to the jury must be viewed as having been made in the heat of the debate, and such statements are usually valued by the jury at their true worth." *Harris v. State*, 539 So.2d 1117, 1123 (Ala. Cr. App. 1988). *See also Orr v. State*, 462 So.2d 1013, 1016 (Ala. Cr. App. 1984); *Sanders v. State*, 426 So.2d 497, 509 (Ala. Cr. App. 1982). The prosecutor admitted as much when he informed the jury that statements made by counsel in closing arguments were not evidence and that sometimes personalities were interjected into the argument, but indicated that this was merely the attorneys doing their job to represent their side of the case the best way they knew how. As we have previously stated,

> "Control of closing argument rests in the broad discretion of the trial judge and, where no abuse of discretion is found, there is no error. *Thomas v. State*, 440 So.2d 1216 (Ala. Crim. App. 1983); *Robinson v. State*, 439 So.2d 1328 (Ala. Crim. App. 1983); *Elston v. State*, 56 Ala. App. 299, 321 So.2d 264 (1975). The trial judge can best determine when discussion by counsel is legitimate and when it degenerates into abuse. *Hurst v. State*, 397 So.2d 203 (Ala. Crim. App.), cert. denied, 397 So.2d 208 (Ala. 1981); *Garrett v. State*, 268 Ala. 299, 105 So.2d 541 (1958)."

Sasser v. State, 494 So.2d 857, 860 (Ala. Cr. App. 1986). As can been seen from an examination of the record, the trial judge maintained close control of closing arguments by both attorneys, and, on several occasions when argument became heated, warned counsel not to overstep their bounds, then instructed the jury that what was said in argument was not to be considered as evidence. We find no abuse of discretion by the trial court. Accordingly, this issue does not warrant reversal.

III

Appellant also contends that the prosecutor was guilty of prosecutorial misconduct when he tried to impeach him for a crime for which he had not been convicted. In the sentence phase of appellant's trial, during cross–examination of the appellant the following occurred:

"Q I see. You know a Mr. Saxon?

"A Yes.

"Q Do you have anything to do with a robbery of his place of business there in Carrollton, Georgia?

"A No, sir.

"Q You deny that?

"A Yes, sir. Because Mr. Saxon knows me personally.

"MR. MORRIS: Judge, could we speak to you?

(Whereupon the following proceedings were held in the presence of, but out of the hearing of the jury:)

"MR. MORRIS: The Defendant moves for a mistrial in this proceeding. He asked him about a specific offense that he has not been convicted of. He's not been arrested in that and he denies it. The Defendant moves for a mistrial.

"MR. GREENE: Your Honor, the Defendant has entered a defense trying to show repentence of a life of crime and he's committed all these offenses. He's been asked about all these offenses. Now he brought it up, we didn't. That's why I did it. I think I'm justified in asking this question.

"MR. MORRIS: Judge, he made the statement — well, I renew my motion and insist on my motion. The law is specific about that, Judge.

"THE COURT: He asked him if he denied it.

"MR. MORRIS: He can't ask that. Now I didn't bring up anything about Mr. Saxon and he knows that.

"THE COURT: I know that. I'll deny the motion at this time.

"MR. MORRIS: I do object.

"THE COURT: I understand."

Generally, the fact that the accused, or any witness, has been investigated, arrested, charged, or indicted is inadmissible to impeach such witness, unless he was subsequently convicted of that offense. *Smitherman v. State*, 521 So.2d 1050, 1059 (Ala. Cr. App. 1987), *cert. denied*, 521 So.2d 1062 (Ala. 1988). In the instant case, however, the prosecutor's question came during the sentence phase of his bifurcated trial. This is an important distinction because of the provisions of § 13A–5–45(c) and (d), which provide in pertinent part as follows:

> "(c) At the sentence hearing evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to the aggravating and mitigating circumstances referred to in sections 13A–5–49, 13A–5–51, and 13A–5–52....
>
> "(d) Any evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements...."

Thus, it is clear that the usual strict rules of evidence are not applicable to sentencing hearings.

Here, appellant testified in great detail at his sentencing hearing in an attempt to establish a mitigating circumstance—specifically, remorse and repentence for his previous life of crime. In order to counter appellant's testimony and to establish the aggravating factor of an extensive criminal history, it was incumbent upon the prosecutor to cross–examine appellant about his prior criminal activities. Thus, it was both relevant and probative for the prosecutor to question appellant about the specifics of his extensive criminal history. Appellant was given ample and fair opportunity to rebut the prosecution's evidence concerning his prior criminal history, and, in fact, admitted to having been convicted of all but the above complained–of incident. By denying this incident, appellant, in effect, did rebut it.

Moreover, since the harmless error applies to capital sentencing hearings, *Ex parte Whisenhant*, 482 So.2d 1241, 1244 (Ala. 1983), no reversal should be had when no undue prejudice resulted to appellant by this inquiry. While we recognize that this rule is to be applied with extreme caution in capital cases, *Ex parte Whisenhant*, 482 So.2d 1247, 1249 (Ala. 1984), we nevertheless find that the instant case is one in which this rule should be applied. First, if appellant were trying to establish a mitigating circumstances based on his remorse and repentance for his life of crime, then his negative answer did not injure that effort. That effort was not dependent upon his showing of a history of crime, but rather, upon his "acquiring religion," remaining drug–free, writing a book warning others about the dangers of drug–abuse, and generally demonstrating good behavior since his imprisonment. Second, being questioned about this incident did not harm him in the sense that absent this incident the State would have failed to establish the aggravating circumstance of appellant's extensive criminal history. In light of the fact that appellant had already admitted to two armed robberies, three burglaries, and a theft, we fail to see that this last inquiry had

any unduly prejudicial impact on the members of the jury given what they had already heard. Had this been a situation where appellant had no prior criminal history, then the State's asking the above complained–of question would most likely have been prejudicial to the appellant. As that is not the case here, the prosecutor's question resulted in no undue prejudice to the appellant. Therefore, no reversal is warrant for his behavior.

IV

The appellant next contends that the evidence adduced at trial was insufficient to support his convictions for capital murder. Specifically, Stephens contends that the State failed to present any direct evidence which linked him to the murders of James R. Bailey and Adam Pickens.

We first note that the mere fact that evidence is of a circumstantial nature does not make it deficient; circumstantial evidence is entitled to the same weight as direct evidence, provided it points to the guilt of the accused. *Linzy v. State*, 455 So.2d 260, 262 (Ala. Cr. App. 1984). The test of the sufficiency of circumstantial evidence is not whether the possibility exists that someone other than the accused committed the crime, but rather whether the evidence excluded every reasonable hypothesis but that of the accused's guilt. *Cumbo v. State*, 368 So.2d 871, 874 (Ala. Cr. App. 1978), *cert. denied*, 368 So.2d 877 (Ala. 1979). Viewing the State's evidence presented to the jury, which is set out above, under the principles enunciated in *Cumbo, supra*, we find that when viewed in the light most favorable to the prosecution, it was sufficient to allow the jury to reasonably find that the evidence excluded every reasonable hypothesis except that of appellant's guilt. The State's evidence established the following: On the afternoon of January 20, 1986, Mr. James R. Bailey and Mr. Adam Pickens were robbed, shot, and left for dead in Bailey's Store in rural Hale

County. They were last seen alive around 4:30 that afternoon. Sylvester Jackson discovered the crime when he went to the store to buy gasoline for his car around 4:45 p.m. At roughly the same time, Ms. Carrie Ingram and Ms. Sheila Kennedy observed a small black pickup truck proceeding rapidly down the road going away from Bailey's store. They saw two people in the truck. Ms. Kennedy believed the passenger was black, but could not be certain since he was slumped down in the seat. Ms. Linda Johnson and her son Kevin also observed the pickup truck in the vicinity of Bailey's store between 4:30 and 5:00 that afternoon. Kevin was able to identify the truck as a black Nissan pickup truck, and he had observed two black males inside the truck. Investigators recovered a .20 gauge shotgun, a .25 caliber automatic handgun, and several bullets and shotgun pellets at the scene of the robbery–homicide. Samples of bloodstains—later determined to be type B blood—at the scene where also taken. From the location of some of the blood stains, investigators determined that Mr. Bailey had very likely shot one of the robbers in the hand with his shotgun. Based on this information, Hale County authorities issued a "be on the lookout" for two armed males, one possibly injured. The following day, Georgia officials discovered the appellant, who had type B blood, in a local hospital being treated for a shotgun blast to his hand. A black Nissan pickup truck registered to the family of Christopher Starks was taken into custody and searched that same day. Among the items recovered were a box of .22 caliber Federal ammunition, a box of Remington ammunition, a box of .25 caliber Federal ammunition, and two wigs. Also found in the truck's floorboard and on the right front seat were some bloody rags, a holster for a .25 caliber pistol, cotton gloves, blood on the seat, and two weapons— a .32 and a .22 caliber revolver—in a Hardee's sack. The glove compartment contained some food stamps—later determined to have been issued in Alabama, specifically Hale and Tuscaloosa counties— and several pieces of identification of the appellant Victor R. Stephens. Subsequent scientific testing revealed that the

bullets recovered at the scene of the crime and from the two victims were fired from the .32 caliber revolver recovered from the black Nissan truck and the .25 claiber automatic pistol recovered at the scene. The bloodstains found in the truck were determined to be from type B blood. Additionally, appellant made three separate statements to authorities, in which he admitted his participation in the robbery–homicides at Bailey's store. Clearly, the evidence was inconsistent with any reasonable theory of innocence. Indeed, all material circumstances in the evidence point to the defendant's guilt. Thus, we find that the evidence presented at trial was sufficient to sustain the appellant's convictions.

V

As required by *Beck v. State*, 396 So.2d 645 (Ala. 1980), and § 13A–5–53, *Code of Alabama* 1975, we have reviewed this case for any error involving appellant's conviction and the propriety of his death sentence.

The appellant, Victor R. Stephens, was indicted and convicted for violating § 13A–5–40(a)(2), *Code of Alabama* 1975, an offense which is punishable by death.

There is no suggestion in the record that the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and there is no evidence to support any such contention.

Our review of the sentence proceedings reveals that the trial court's findings concerning the aggravating and mitigating circumstances are supported by the evidence. The trial court found the existence of two aggravating circumstances: first, that the capital offense was committed while the defendant was engaged in the commission of a robbery, § 13A–5–49(4), *Code*

of Alabama 1975; and second, that the defendant had been previously convicted of a felony involving the use or threat of violence to the person, § 13A–5–49(2), *Code of Alabama* 1975. After considering each of the statutory mitigating circumstances set out in § 13A–5–51, *Code of Alabama* 1975, and the possibility of any non–statutory mitigating circumstances as allowed by § 13A–5–52, *Code of Alabama* 1975, the trial court found the existence of no statutory mitigating circumstances. The trial court did, however, find that the defendant's recognition of his drug abuse as the cause for his behavior and his actions in writing a book that would warn teenagers of the pitfalls of using drugs to be a non–statutory mitigating circumstance to be considered in sentencing the defendant.

Our independent weighing of the aggravating and mitigating circumstances convinces this court of the proprietary of the death sentence in this case.

Moreover, we are convinced that the death sentence is neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Indeed, fully two–thirds of Alabama death sentences have been imposed on defendants convicted of capital murder arising out of robbery–homicides. *Beck v. State*, *supra*, 396 So.2d at 654 n. 5. *See also, e.g., Hinton v. State*, 548 So.2d 547 (Ala. Cr. App. 1988), *aff'd*, 548 So.2d 562 (Ala. 1989), *cert. denied*, __U.S.__, 110 S.Ct. 419, 107 L.Ed.2d 383 (1990); *Bell v. State*, 475 So.2d 601 (Ala. Cr. App. 1984), *aff'd*, 475 So.2d 609 (Ala.), *cert. denied*, 474 U.S. 1038, 106 S.Ct. 607, 88 L.Ed.2d 585 (1985); *Jones v. State*, 456 So.2d 366 (Ala. Cr. App. 1983), *aff'd*, 456 So.2d 380 (Ala. 1984), *cert. denied*, 470 U.S. 1062, 105 S.Ct. 1179, 84 L.Ed.2d 838 (1985).

VI

Appellant's final contention is that death by electrocution as applied by the State of Alabama constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. This argument has previously been rejected. In addressing this issue, this Court, per Judge Patterson, held in *Jackson v. State*, 516 So.2d 726, 737 (Ala. Cr. App. 1985), *remanded on other grounds*, 516 So.2d 769 (Ala. 1986), that

> "The United States Supreme Court addressed the death by electrocution issue in *In re Kemmler*, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (1890). In determining what constitutes cruel and unusual punishments, the Court stated: 'Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there is something inhuman and barbarous, — something more than the mere extinguishment of life.' *Id.* at 447, 10 S.Ct. at 933. In holding that such a punishment is not cruel or unusual, the Court reasoned 'that this act was passed in the effort to devise a more humane method of reaching the result.' *Id.* Accord *Spinkellink v. Wainwright*, 578 F.2d 582, 616 (5th Cir. 1978). Appellant's contention is therefore without merit; death by electrocution does not amount to cruel and unusual punishment per se, but is a constitutional means of imposing a sentence of death."

See also Wright v. State, 494 So.2d 726, 741 (Ala. Cr. App. 1985), *aff'd*, 494 So.2d 745 (Ala. 1986), *cert. denied*, 479 U.S.

1101, 107 S.Ct. 1331, 94 L.Ed.2d 183 (1987). The appellant has presented no evidence that this state's method of execution involves torture, and thus, no reason exists for this Court to overrule its previous holdings on this issue.

VII

Finally, we have searched the entire record for any plain error or defect which might have adversely affected the appellant's substantial rights and have found none. Rule 45A, A.R.App.P.

The appellant received a fair and impartial trial. Therefore, his convictions for these capital offenses and his sentence of death are due to be, and they are hereby, affirmed.

AFFIRMED.

All the Judges concur.

APPENDIX C

STATE OF ALABAMA	*	IN THE CIRCUIT COURT OF
VS.	*	HALE COUNTY, ALABAMA
VICTOR R. STEPHENS	*	CASE NO. CC–86–34

SENTENCING ORDER

The Defendant was charged by a two count indictment with the murder of Adam Pickens and James R. Bailey during the commission of a Robbery in the First Degree, both being capital offenses. A jury returned a verdict on December 17, 1987 finding the Defendant guilty of both counts of the Capital Offense, whereupon, the court adjudged the Defendant guilty in accordance with the jury's verdict.

Following the adjudication of guilt, a separate sentence hearing was conducted before the same jury, and the jury returned a recommendation that the Defendant be sentenced to life imprisonment without parole.

The Court has ordered and received a written pre–sentence investigation report and has conducted an additional sentence hearing pursuant to Section 13A–5–47 of the Code of Alabama, 1975. At the sentence hearing, the State, through its District Attorney, urged that the Court fix the Defendant's punishment at death. The Defendant, through his counsel,

argued that the court should fix his punishment, in accordance with the jury's recommendation at life imprisonment without parole.

FINDINGS OF FACTS SUMMARIZING THE CRIME AND THE DEFENDANT'S PARTICIPATION IN IT

The bodies of James R. Bailey and Adam "Pop" Pickens were discovered at Bailey's Grocery Store on Alabama Highway 14 in the Wedgeworth Community of Hale County, Alabama on January 20, 1986. Mr. Bailey, age 72, the owner of the store, was found dead inside the store apparently of multiple gunshot wounds. Adams Pickens, age 82, was discovered alive inside the store suffering from multiple gunshot wounds. Mr. Pickens was transported by ambulance to Druid City Regional Medical Hospital in Tuscaloosa, Alabama wherein he died shortly after admittance to the medical facility.

On Monday, January 20, 1986, a customer, Sylvester Jackson, came to the store at approximately 4:45 p.m. in order to purchase gasoline for his vehicle. After pumping the gas, Mr. Jackson entered the store and observed both victims on the floor. Mr. Jackson promptly left, told his mother of the incident, and asked that the Sheriff be notified. Hale County Sheriff, H.C. Colvin, Alabama Bureau of Investigation Investigator, C.W. Gibson; and Forensic Science Crime Scene Examiner, John McDuffie arrived at the store to begin their investigation and collection of evidence.

At trial, Carrie Ingram and Sheila Kennedy stated that in the late afternoon of January 20, 1986, they were walking in Akron, Alabama on Alabama Highway 60 in the oncoming traffic lane wherein they were met by a small black pickup truck

traveling at a high rate of speed. The witnesses testified that the passenger of the vehicle was black and that the truck was proceeding in a direction away from the Bailey's Store. Testimony established that the witnesses' location was approximately six miles from the Bailey Store.

Kevin Johnson testified that he was riding with his mother in Akron and also observed a small black truck proceeding at a high rate of speed. Kevin, age 14, testified that he observed two black males in the pickup and that he was certain that the vehicle was a Nissan as he observed the lettering "NISSAN" on the back of the truck.

The examination of the store revealed that Mr. Bailey was robbed of money and food stamps and that Mr. Bailey had fired his .20 gauge shotgun at the intruders. Adam Pickens was unarmed. Mr. Bailey was found dead in the middle of the store still clutching his shotgun. Mr. Bailey had apparently been shot in a different location inside the store as there was a trail of blood leading to Bailey's body. Further examinations of the scene revealed that one individual, later determined to be the Defendant, Victor R. Stephens, had been hit by the shotgun as blood was found near the front door together with a .25 caliber automatic pistol. A No. 8 shotgun pellet was removed from the barrel of the weapon.

Pursuant to the information received from witnesses and the evidence collected at the scene, Hale County Sheriff's Department issued a regional teletype advising law enforcement agencies to "Be On The Lookout" for two males armed, one possibly injured. A request was made of these agencies to check area clinics and hospitals for persons with possible gunshot wounds. On Tuesday, January 21, 1986, Georgia Bureau of Investigation Agent Charles Stone and ABI Agent Ed Traylor advised the Hale County Sheriff's Department that both subjects were in custody in Carroll County, Georgia. Further

information from Georgia officials revealed that Christopher L. Starks was apprehended in possession of a .32 caliber pistol and that Victor R. Stephens was treated for a shotgun wound in his left hand at the Bowdon Area Hospital in Carroll County, Georgia on Monday evening.

Autopsies were performed on both victims and the results revealed that James R. Bailey had died as a result of multiple gunshot wounds to the face, chest, abdomen, and hand. Both expended .32 caliber and .25 caliber bullets were removed from Mr. Bailey's body. Adam Picken's autopsy revealed that he died from four separate gunshot wounds to the back. Analysis revealed that all four expended bullets recovered from Picken's body were .25 caliber.

On Wednesday, January 22, 1986, a black Nissan pickup truck owned by Christopher L. Starks, a co–defendant, was searched by law enforcement agencies. Taken from the vehicle were blood stains from the passenger's seat together with three (3) one dollar food stamps issued from Hale County and Tuscaloosa County, Alabama. Also taken from the glove compartment of the truck were identification papers belonging to Victor R. Stephens.

A series of statements were taken by law enforcement officers from the Defendant, Victor R. Stephens, while he was in the custody of Georgia officials. These statements were taken orally on January 23, 25 and 28, 1986. The gist of the three statements revealed that Christopher Starks, also known as, "Peabody" and Victor Stephens left the State of Georgia on Saturday and traveled to New Orleans, Louisiana where they remained until Monday. On Monday, with Starks driving, the two went to a store in Alabama occupied by a white male (later identified as James R. Bailey) and a black male (later identified as Adam Pickens). Stephens stated throughout these statements that it was Starks's idea to commit the robbery.

Stephens further stated that after entrance to the store by "Peabody", the white man fired his shotgun at Stephens striking him in the left hand. It was at this time that Stephens "emptied" his .25 caliber pistol. According to Stephens, Starks was armed with either a .22 or .32 caliber pistol. Stephens admitted leaving the .25 caliber automatic pistol at the store.

During the trial, Forensic Serologist, Larry Huys, testified that he received blood samples from both victims Bailey and Pickens and determined that each had ABO type "O" blood. Receipt of Defendant Stephen's blood revealed his blood to be ABO type "B". Examination of blood from the passenger seat of Stark's 1986 Black Nissan pickup together with blood removed from the door facing and concrete of the Bailey Store revealed that all three items were of blood type "B", consistent with Defendant Victor R. Stephen's blood type.

Seven expended bullets were removed from the victims (three from Bailey, four from Pickens) and examined by Forensic Firearm Examiner Lawden Yates. The analysis revealed that two .32 caliber bullets and one .25 caliber bullet were removed James R. Bailey and all four bullets removed from Adam Pickens were .25 caliber. Further examination positively identified all the .32 caliber bullets to have been fired from the same .32 caliber pistol found on the person of Christopher L. Starks at the time of his arrest. The five .25 caliber bullets were matched to the .25 caliber pistol that was left at the store and admittedly fired by Victor R. Stephens. Shotgun pellets removed from Stephen's hand were compared with shot pellets removed from the store and the barrel of the .25 caliber gun and the analysis revealed all to be No. 8 shotgun pellets, consistent with the type shell recovered from Bailey's weapon.

FINDINGS CONCERNING THE EXISTENCE OR NON-EXISTENCE OF AGGRAVATING CIRCUMSTANCES

In compliance with the requirements of law that the trial court shall enter specific findings concerning the existence or non-existence of each aggravating circumstance enumerated by statute (13A-5-47 of the Code of Alabama, 1975) the court finds that none of the aggravating circumstances enumerated by statute were proved beyond a reasonable doubt in the proceedings before this Court *except* the following which the Court finds were proved beyond a reasonable doubt:

1. *The capital offense was committed while the Defendant was engaged in or was an accomplice in the commission of, or an attempt to commit or flight after committing or attempting to commit robbery.*

The facts presented by the State at trial were overwhelming as to the existence of this aggravating circumstance and the verdict by the jury to these two separate counts of Capital Murder is fully supported by the evidence. It was clear that the Defendant left the interstate on his return trip from Louisiana for the purpose of committing the robbery. The location of the Bailey Store was miles from any incorporated community. The store was operated by Mr. Bailey and his friend of 40 years Adam Pickens.

The intent to kill these victims was as clear as glass. Bullets were removed from the cash register, next to the meat cooler, and from the bodies of James R. Bailey and Adam Pickens. It was obvious that Mr. Bailey was fired at as he stood behind the cash register and consistently as he moved behind the cooler to the middle of the room. Just as clear was the fact that

Adam Pickens was shot four times in the back as he sat on the stool of the store. It certainly may be argued that Adam Pickens never saw his killer.

Statements made by the Defendant that he only fired after [Bailey] fired at him with the shotgun are totally false and unworthy of belief. Forensic evidence revealed that a No. 8 shot pellet was removed from the barrel of the .25 caliber automatic pistol. The Defendant admitted "emptying" his weapon. Obviously the Defendant "emptied" his pistol *before* Mr. Bailey fired his single shot .20 gauge shotgun. These .25 caliber bullets were recovered in the cash register as well as from the bodies of *both* Bailey and Pickens. To suggest, as Defendant has, that he fired in self–defense is completely beyond comprehension.

2. *The Defendant was previously convicted of a felony involving the use or threat of violence to the person.*

In establishing this aggravating circumstance, the State of Alabama has introduced into evidence a certified copy from the Circuit Court of Randolph County, Alabama, reflecting convictions of the Defendant, Victor R. Stephens, on October 20, 1987 for Robbery 1st Degree and Attempted Murder. The Defendant, as a habitual offender, was sentenced to life imprisonment without parole for this offense. The Court draws particular note in that the January 9, 1986 Randolph County incident was remarkably similar in nature to the present case arising within weeks of the death of James R. Bailey and Adam Pickens.

The Defendant's previous actions noted in these prior convictions certainly begin to establish a pattern of ruthlessness, violence, and utter disregard for human life.

FINDINGS CONCERNING THE EXISTENCE OR NON-EXISTENCE OF MITIGATING CIRCUMSTANCES

I

In compliance with the statutory requirement that the trial court enter specific findings concerning the existence or non-existence of mitigating circumstances enumerated by statute, the Court finds that none of the following mitigating circumstances exist in this case:

1. *That the Defendant has no significant history of prior criminal activity.*

In the sentencing phase, the Defendant took the stand and testified to a significant history of criminal activity. Mr. Stephens admitted and the State has offered numerous prior convictions in addition to the Robbery First Degree and the Attempted Murder used by the State as an aggravating circumstance. These exhibits reflect an extensive history of property crimes which began when the Defendant was 18 years old. These exemplified copies include four burglary convictions and a theft by receiving stolen property all in Carroll County, Georgia in January, 1981. Mr. Stephens's criminal record is, simply put, atrocious. His degree of activity has increased from property crimes to the use of force to obtain one's property to the final stage of death in taking one's property. Not only has his conduct become violent but it has now expanded to three separate jurisdictions in two states.

2. *That the capital offense was committed while the Defendant was under the influence of extreme mental or emotional disturbance.*

After the Defendant's arraignment, counsel for Victor R. Stephens requested that the Defendant be committed to the Taylor Hardin Secure Medical Facility at Tuscaloosa, Alabama for evaluation and examination. Pursuant to Section 12–16–22 of the Code of Alabama, 1975, a Lunacy Commission was appointed to determine Stephen's competency to stand trial and his mental state at the time of the January 20, 1986 incident at the Bailey Store. Doctors Thompson, Nagi, and Bryant, all staff psychiatrists, examined the Defendant separately and their findings were as follows:

a. There was no evidence of any past or present severe disturbance in Mr. Stephen's thinking or emotions.

b. There appears to be a general history of alcohol and drug abuse and anti–social behavior.

c. At the present time, Mr. Stephens appears to be able to understand the nature and consequences of the charges against him, to participate rationally in court proceedings and to assist his attorney in his own defense.

d. There does not appear to be any evidence that Mr. Stephens was experiencing any psychiatric disorder at the time of the alleged offense.

e. There does not appear to be any evidence that Mr. Stephens was experiencing any psychiatric disorder at the time of the alleged offense that would have made him unable to understand the nature and consequences of his behavior or to control his behavior in conformity with law.

While the Court recognizes that this mitigating circumstance contemplates a disturbance of the mind which might exist separate and apart from a mental disease or defect, and that the report of the psychiatrists is, by no means, conclusive, the Court finds from the consideration of all the evidence including the Defendant's admitted drug usage, that the Defendant was not under the influence of extreme mental or emotional disturbance.

3. *That the victim was a participant in the Defendant's conduct or consented to it.*

There is no support for this mitigating circumstance. The testimony was clear that James R. Bailey and Adam Pickens were unknown to Victor R. Stephens and Christopher L. Starks. James R. Bailey and Adam Pickens were the owner and employee of the Bailey Store and the testimony revealed that they were performing their normal daily activities of running the business on the date of their death. To suggest that James R. Bailey or Adam Pickens were participants in the Defendant's conduct or consented to their deaths would be totally false and completely without merit.

4. *That the Defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.*

The evidence was uncontroverted that the Defendant, Victor R. Stephens, was accompanied by Christopher L. Starks at that time of the robbery and deaths of the two victims. Certainly, Christopher L. Starks was a participant and his involvement was substantial due to the fact that the .32 caliber pistol found in his possession was identified as causing the death of James R. Bailey. However, to suggest that the Defendant, Victor R. Stephens was a mere accomplice in the capital offense and that his participation was minor could not be supported by the evidence. Victor R. Stephens by his own testimony has admitted firing his .25 caliber automatic pistol until he had "emptied" the weapon. The forensic evidence submitted at trial reflects that .25 caliber bullets were recovered from both the body of James R. Bailey and Adam Pickens.

The Court is also aware that the Defendant, Victor R. Stephens, has attempted to place the primary blame for the deaths of Bailey and Pickens on Christopher L. Starks. A consideration of all the evidence in the case revealed that Victor R. Stephens was a willing participant who planned the robbery, caused the deaths of *both* victims, and shared in the proceeds of the robbery.

5. *That the Defendant acted under extreme duress or under the substantial influence of another person.*

One of the Defendant's major contentions mentioned in his statements to law enforcement officers was that the idea of the robbery was Christopher L. Starks's. The evidence present at trial does reveal that Stephens was in the vehicle of

Christopher L. Starks when they were returning from Louisiana and the evidence also establishes that Christopher L. Starks drove the vehicle from the Bailey Store and back to Carroll County, Georgia. However, the evidence simply does not corroborate Stephens's contention of being under the substantial influence of Christopher L. Starks. The autopsies revealed that .25 caliber projectiles were recovered from both James R. Bailey and Adam Pickens. The Defendant by his own words admits to "emptying" his .25 caliber pistol at the store. What Victor R. Stephens fails to state in his interview with law enforcement officers is that he also fired at Adam Pickens. He attempts to suggest that the only reason the weapon was fired was in self–defense to James R. Bailey's shotgun. In retrospect, when all the evidence is considered the truth is simply not told by Victor R. Stephens. Victor R. Stephens did not know that a shot pellet from the Bailey's .20 gauge shotgun was recovered inside the barrel of Stephens's pistol.

The record as a whole revealed that the dominant party, if there was one, was Victor R. Stephens. The evidence certainly establishes that this robbery was a planned act by both individuals and that Victor R. Stephens was the "trigger man" causing the death of both victims in the January 20, 1986 robbery.

6. *That the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.*

The Defendant originally entered a plea of not guilty by reason of mental disease or defect. With regard to the insanity defense, there was no evidence presented to the jury during the guilt phase to show any possible basis for a charge of not guilty by reason of mental disease or defect. Because of this complete lack of evidence, this Court did not instruct the jury on the insanity defense. While the Court recognizes that this

mitigating circumstance contemplates impaired capacity which might exist separate and apart from the mental disease for defect, the Court finds, from a consideration of the Lunacy Commission report of the Taylor Hardin Secure Medical Facility and the testimony provided by the Defendant during the sentencing phase, that this mitigating circumstance does not exist.

7. *The Age of the Defendant at the time of the crime.*

Victor R. Stephens was 23 years of age at the time he committed the capital offense of which he is convicted. One might argue that a 23 year old was in the early years of his adult life and would not be as responsible for his actions as one older. However, one must look to the actions of Victor R. Stephens considering his age. At the age of 18, Victor R. Stephens adopted a life style of an adult. Six weeks after his 18th birthdate, Victor R. Stephens committed five separate felonies in the State of Georgia, and, subsequently was sentenced to the penitentiary for a period of six years. Apparently, the Defendant never attempted to rehabilitate himself from his early criminal activity as he committed two violent offenses of Robbery 1st Degree and Attempted Murder just 11 days prior to the January 20, 1986 offenses at the Bailey Store. The continued criminal activity in which the Defendant engaged was less akin to the behavior of a young adult, but more akin to the conduct of a seasoned criminal.

Additional consideration has been given by this Court as to any non–statutory mitigating circumstances presented by Victor R. Stephens at the sentencing hearings. Mrs. Stephens, mother of the Defendant, together with Mr. Stephens presented testimony as to why his life should be spared. They both addressed the Defendant's drug addiction and its involvement in all of his criminal activity. The Defendant has stated that since his imprisonment, he has begun writing a book that would warn teenagers of the pitfalls of drug usage. This is an admirable gesture by Mr. Stephens and worthy of considerations by this Court in mitigation.

CONCLUSION

The Court has carefully weighed the existence of the statutory aggravating circumstances and the *non*–existence of any of the statutory mitigating circumstances and has additionally considered both the non–statutory mitigating circumstances and the recommendation of the jury. While the non–statutory mitigating circumstances and the jury's recommendation of life imprisonment without parole have weighed heavily in the Court's consideration, it is the judgement of this Court that they are substantially outweighed by the aggravating circumstances and non–existence of statutory mitigating circumstances, it is therefore,

ORDERED, ADJUDGED, and DECREED that the Defendant shall be punished by death.

DONE and ORDERED, this 24th day of July, 1989.

Judge Charles A. Thigpen
Judge of the Circuit Court
Fourth Judicial Circuit

91-66

No. 91-

Supreme Court, U.S.
FILED
JUL 8 1991
OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

VICTOR STEPHENS,
Petitioner,
—against—
THE STATE OF ALABAMA,
Respondent.

On Writ of Certiorari To The Supreme Court of Alabama

APPENDICES D–E

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July 8, 1991

APPENDIX D

Circuit Court of Hale County, Alabama

Direct Examination of Charles S. Stone by Prosecution

Stephens Trial

Record 26–38

CHARLES S. STONE

called on behalf of the State, was duly sworn and testified as follows, to–wit:

DIRECT EXAMINATION

By Mr. Sullivan

Q State your name, please.

A Charles S. Stone

Q How are you employed, sir?

A Special Agent with the Georgia Bureau of Investigation.

Q How long have you been with the Georgia Bureau of Investigation?

A Over 14 years.

Q And what is your position or rank, please, sir?

A Right now, I'm an Assistant Special Agent in charge of Special Prosecution Task Force.

Q All right. And you're with the Georgia Bureau of Investigation?

A Yes.

Q Drawing your attention to an individual by the name of Victor Stephens, did you have occasion to have a conversation with him on or about January 23rd?

A Yes, sir; I did.

Q Where was that conversation?

A At the Carroll County Jail, Investigative Office Section.

Q That's January 23, 1986?

A Yes, sir. Approximately 3:40 p.m.

Q All right. And Carroll County, that's Carroll County, Georgia; is that right?

A Yes, sir.

Q All right. At the time you talked to Mr. Stephens, who was present, sir?

A Myself and A.B.I. Agent, Ed Traylor.

Q All right. Now prior to having a conversation with him on January 23, 1986, at the Carroll County Jail, did you have an occasion to read him his Miranda Rights, sir?

A I read it from my Waiver card.

Q All right. And specifically, if you would, please tell the Court what rights were read to him. Now this is from a card; is that correct?

A Yes.

"You have a right to remain silent. Anything you say can and will be used against you in a court of law. You have a right to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning. You may decide at any time to exercise these rights and not answer any questions or make any statements."

Q All right. Now, besides yourself and Mr. Traylor, was anybody else present with Victor Stephens?

A No.

Q What was the condition of Mr. Stephens at the time the statement was taken, sir?

A Mr. Stephens was lucid. He was responsive to questioning. He answered that he understood his rights. He appeared to be physically normal with the exception that he was suffering from a gunshot wound to the hand. He was in the custody of the jail and he was a hospital inmate. He was incarcerated in the jail. Again, he was very lucid.

Q All right. Did he appear to be under the influence of any drugs or alcohol?

A No, sir; he did not.

Q All right. Now after his rights were read to him verbally, was there also a Miranda form signed, sir?

A No, sir; not at this interview. There was on the 25th.

Q All right. Now prior to taking a statement from him, did you or anyone in your presence make any promises to him in order to obtain a statement from him?

A No, sir; we did not.

Q Prior to obtaining a statement from him did you or anyone in your presence make any threats to him in order to obtain a statement from him?

A No, sir; we did not.

Q Prior to obtaining a statement from him, did you or anyone in your presence make any inducements in order to obtain a statement from him?

A No, sir.

Q Prior to obtaining a statement from him, did you or anyone in your presence tell him it would be any better or worse in order to obtain a statement from him?

A No, sir.

Q All right. Now after his rights were read to him, did he agree to make a statement?

A Yes, sir; he did. He answered that he understood his rights.

Q All right. And how was this statement taken, sir?

A It was taken — I made notes myself and Agent Traylor made notes per our usual policy. I go back and dictate

any notes I have and they're transcribed into an investigative summary. This is on the interview on January 23rd. On January 25th, that interview, I took a handwritten statement from him.

Q All right. Now concerning this verbal statement, after you made your notes concerning this interview, was it presented back to Mr. Stephens for his signature of the January 23rd statement?

A No, it was not.

Q All right. Now concerning that statement, what did he tell you on that occasion?

A We questioned him concerning how he initially got shot. He stated that he and Christopher Starks had been riding around. He stated he did not know exactly where they were, but he did know they were in Alabama. I explained to him about the armed robbery murder that occurred here in Hale County and at that time he admitted that he and Chris Starks were involved in the shooting. He stated that he was shot by one of the men with a shotgun when he walked in. He stated he didn't know who shot first and he didn't know why the shooting went down. He stated that it was Chris Starks' idea to rob the store. He also related he had been taking cocaine and LSD prior to the robbery and could not remember all of the details. I questioned him concerning how much, what kind of drugs he had taken and he related he bought a couple eight balls of cocaine and some acid or LSD. When I questioned him about the details of the robbery and murder, he related there were two men in the store. One white man and one black man and it was the white man that had shot him with the shotgun. He related — I questioned him concerning dropping a .25 caliber pistol that was

recovered at the scene. He stated he dropped it when he was shot and he also related that they had been in Chris Starks' black Nissan truck. When I explained to him during the search of the truck we had uncovered some food stamps that had been identified as coming from the robbery and murder and that the weapons had been matched ballistically, and I'm quoting now, he says, "You have it just like it was. I don't want to talk about killing them two men anymore." He stated he knew he was going to die and that I could go ahead and put him in the electric chair. At which time, the interview was concluded.

Q All right. Any other conversation with him on the 23rd?

A No.

Q Now that interview was at what time, sir?

A Approximately 3:40 p.m.

Q All right. How long did that interview last, as best you can remember?

A Best of my recollection, probably 45 minutes to an hour.

Q All right. Now your next conversation with Mr. Stephens was on the 25th; is that correct?

A Yes, sir.

Q All right. Drawing your attention to January 25, 1986, did you have an occasion to have a conversation with him at that time?

A Yes, I did.

Q All right. And where was that conversation and who was present?

A Again, it was in the Carroll County Jail. Myself and Chief Deputy Dennis Holloway — excuse me, Chief Investigator.

Q Now that was at the Carroll County Jail; is that correct?

A Yes, sir.

Q All right. And what time did that interview take place and was anybody else present besides Mr. Stephens, Mr. Holloway, and yourself?

A No, sir.

Q All right.

A It took place at approximately 2:25 p.m.

Q All right. Now on that occasion, were his rights read to him prior to taking the statement?

A Yes, sir; from the Miranda form.

Q Do you have a copy of that or is that the original?

A This is a copy.

Q All right. Where is the original.

A It was introduced as evidence in the Defendant's prior trial in Randolph County.

Q All right.

MR. SULLIVAN: Judge, we expect at the time of trial we'll have that original.

MR. GREENE: You want me to make a copy of that?

MR. SULLIVAN: Yes.

MR. MORRIS: I would like to have a copy of his statement.

(Whereupon State's Exhibit No. 1 was marked for identification by the reporter.)

Q (Continuing:) I show you what is marked as State's Exhibit 1 for the purpose of this hearing. I ask you if you recognize that?

A It's the Xerox copy of the statement I obtained on January 25, 1986 from the Defendant.

Q All right. Now drawing your attention first to page one, what is that, sir?

A This is a Miranda Waiver form that I utilized at the jail. The place is Carrol County Jail and the date is January 25, 1986. The time is 2:25 p.m.

"Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can and will be used against you in a court of law.

You have the right to talk to a lawyer for advice before we ask you any questions and have him with you during questioning.

If you cannot afford to hire a lawyer, one will be appointed for you before questioning, if you wish. If you decide to answer questions now without a lawyer being present, you would still have the right to stop answering any questions at any time.

You also have the right to stop answering at any time until you talk to a lawyer."

Then it says, "Waiver of Rights.

I read the statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing and no promises or threats have been made to me and no pressure or coercion of any kind has been used against me." It's signed, "Victor Stephens," witnessed by myself and Dennis Holloway.

Q All right. Now concerning that document that you just read from, sir, Victor Stephens' signature, I believe you stated, is on that document?

A Yes, sir.

Q Were you present at the time his signature was placed on that document?

A Yes.

Q And do you see Mr. Stephens here today, sir?

A Yes, sir; he's seated right there.

Q Is that the same individual that you took your verbal statement from on January 23, 1986?

A Yes, it is.

Q All right. At the time that he signed that Waiver of Rights, that Miranda form, sir, what was his condition on that occasion?

A He was dressed in, I belive, inmate clothing.

Carroll County Inmate Jail clothing. He was responsive to questioning. He was lucid and he didn't appear to be under the influence of drugs or alcohol. He was afforded an opportunity to go to the restroom and was offered coffee and water, I believe, and in general, he appeared receptive to questioning.

Q All right. Did he agree to make a statement?

A Yes, sir; he did.

Q Prior to obtaining a statement from him on that occasion, did you or anyone in your presence make any promises to him in order to obtain a statement from him?

A No, sir.

Q Prior to obtaining a statement from him, did your or anyone in your presence make any threats to him in order to obtain a statement?

A No, sir.

Q Prior to obtaining a statement from him, did you or anyone in your presence make any inducements to him in order to obtain a statement from him?

A No, sir.

Q Prior to obtaining a statement from him, did you or anyone in your presence tell him that it would be better or any worse in order to obtain a statement from him?

A No, sir.

Q Did he make a statement, sir?

A Yes, sir; he did.

Q And how was that statement taken?

A The statement was, as he told it to me, I wrote it down.

I let him read it and sign it.

Q All right. At the time that he had the opportunity to read it and sign it, was it read to him?

A I read sections of it, I believe, and then I presented him with the completed thing when we finished. He looked it over and initialed some mistakes I had made on it. We struck through it and he initialed it and gave it back to me.

Q All right. He had the opportunity to make any changes that he saw fit in that statement?

A Yes, sir.

Q Did he do so?

A No. Other than initial where I struck through some words, he was speaking faster than I could write and I struck through a couple words. I asked him to initial any mistakes or corrections.

Q All right. Did he ask for any changes to be made in that statement?

A No, he did not.

Q All right. Did he sign that statement?

A Yes, he did.

Q And what was that — was that done in your presence?

A Yes, sir.

Q And who witnessed that statement?

A Myself and Dennis Holloway.

Q All right. Now concerning State's Exhibit No.1, what statement did he give you on January 25, 1986 in Carroll County, Georgia, sir?

A "Statement of Victor Stephens.

The only two robberies I ever did with Christopher Starks (Peabody) were in Alabama. I don't know anything about Robert Saxons murder.

It was Peabody's idea to rob the store the other night near Wesdo. He shot the man with a .22 pistol. I don't know how much money we got total. Terry stayed at the car. I stayed on the outside and Peabody went in. I got a little over $200. Terry got 30 something. When we left the store Peabody got in the trunk of my car and we left. We crossed a bridge on the way back and threw out the checks and some beer cans. Me and Terry went home after that.

The other robbery I just walked into the store after Peabody went in. He had been in a while so I went in to see what was happening. When I walked in, the white man started shooting with a shotgun. I just pulled out my pistol and started shooting. We left and came back to Georgia. We went to Charlie Dalla's house. Charlie Dallas carried me to the hospital.

Q Did Peabody shoot anybody in Alabama?

A I emptied my .25 but I don't know about him.

Q What kind of gun did Peabody have?

A. He had a .22 and a .32. I had bought the .25 from him on Friday or Saturday. He bought some .25 and .22 shells at Wal–Mart in Carrollton."

Signed, "Victor Stephens."

Q All right. And you saw him sign that document and your signature is there as a witness?

A That's correct.

Q All right. Now drawing your attention to January 28, 1986, were you present when a statement was taken?

A No, I don't believe so.

Q All right. So concerning Victor Stephens, those were the only two statements you took concerning the case in Hale County?

A That's correct.

Q All right. At the time that these statements were taken from him on January 23rd and January 25th, was he under arrest, sir?

A Yes, sir.

Q What was he under arrest for?

A I arrested him on a fugitive warrant out of Randolph County, Alabama on a charge of armed robbery and the Alabama equivolent of aggravated assault.

Q That was the purpose for him being in the Carroll County Jail?

A Yes.

MR. SULLIVAN: Pass the witness.

Circuit Court of Hale County, Alabama
Direct Examination of Charles Stone by Prosecution
Stephen's Trial
Record 612–627.

CHARLES STONE

called on behalf of the State, was duly sworn and testified as follows, to wit:

DIRECT EXAMINATION

BY MR. SULLIVAN:

Q State your name, please

A Charles Stone.

Q And how are you employed?

A Special Agent with the Georgia Bureau of Investigation.

Q And, Charles, how long have you been in law enforcement, sir?

A Been in law enforcement a little over 15 years. I've been employed by the Georgia Bureau of Investigation for a little over 14 years.

Q A little over 14 years?

A Yes, sir.

Q Now GBI, that's Georgia Bureau of Investigation, sir?

A Yes, sir; that's correct.

(Whereupon the following proceedings were held in the presence of, but out of the hearing of the jury:)

MR. MORRIS: If the Court will allow me, I want a continuing objection rather than having to object to every aspect of this line of questioning. I request of the Court and reserve — I want to preserve the record that I object to any out–of–court confessions or any statements made by the Defendant and if I can protect the record that way, I would appreciate it.

MR. SULLIVAN: That's fine.

MR. MORRIS: Then it would remove any necessity for my objecting. I do not waive anything. I do not consent or confess anything as to any aspect of the confessions.

MR. SULLIVAN: We understand.

THE COURT: *You have a continuing line of objection.*

(Whereupon the following proceedings were resumed in the presence and hearing of the jury:)

Q (By Mr. Sullivan, Continuing:) What duties do the GBI —

A Basically, we serve in the same capacity as the ABI in Alabama. We're an assistance or joint agency for the local and county law enforcement in the areas of general criminal investigation such as homicides, robberies. We work at the request of local law enforcement agencies, Sheriff's department, police departments, judges. They

can request our services. We also have jurisdiction in organized crime and narcotics.

Q Now, do you have a rank or position, sir?

A Yes. I'm Assistant Special Agent in charge of, and the full name is Special Prosecution Task Force and what it entails is the investigation of organized crime and political corruption in the State of Georgia. At the time of this occurrence, I was working as a field agent in the Thomaston field office in the area of homicide and armed robberies.

Q Carroll County was in your area?

A Yes, it was.

Q Now, drawing your attention to this particular matter involving Victor Lamar Stephens, sir, did you have the occasion to see him in Georgia after January 20, 1986, sir?

A Yes, sir. On January 21st, I saw Mr. Stephens in the hospital in Carrollton, Georgia.

Q All right. That was the hospital in Carrollton, Georgia?

A Yes.

Q What was the purpose of seeing him at that time?

MR. MORRIS: Objection to the purpose. He can testify to what he did.

Q (Continuing:) What did you do?

A Placed the Defendant under arrest.

Q Now that was at the hospital in Carroll County; is that correct?

A That's correct.

Q Now after doing that, on a later date, drawing your attention to January 23, 1986, did you have the occasion at that stage to take a statement from him, sir?

A Yes sir; I did. On that date, myself and ABI Agent Ed Trailer, interviewed the Defendant at the Carroll County Jail in the investigative office section.

Q Do you see Victor Stephens in the courtroom here today, sir?

A Yes, sir; I do. He's the black male seated at the table on my right wearing a dark colored jacket and I believe with a striped shirt.

Q Let the record reflect that the witness has pointed to the Defendant, Victor Lamar Stephens. Now I believe you stated that you and Ed Trailer and the Defendant were present at the Carroll Count Jail; is that correct?

A Yes, sir.

Q Was anybody else present at the time that a statement was taken from him, sir?

A No, sir; not at this time.

Q When you first observed him at the Carroll County Jail, what was his condition, sir?

A He was clothed in jail clothes. He had a bandaged left hand. He was lucid. He was responsive to questioning. He knew where he was.

MR. MORRIS: We object to these conclusions on behalf of the law enforcement officer. He can testify to what he observed, he can't testify to – –

THE COURT: State your question again.

MR. MORRIS: It was unresponsive. The question was all right, the answer was not responsive.

Q (Continuing:) At the time you took the statement from him, if you would, please tell the ladies and gentlemen of the jury what his condition was, sir. Tell the jury what you observed about him.

A He was mentally alert. I would ask him questions, "Do you know where you are," and this type thing and he was responsive. He knew where he was. He knew who he was talking to.

MR. MORRIS: Objection to him testifying to what Mr. Stephens supposedly knew. He cannot testify to that, Judge. We object to that question.

MR. SULLIVAN: He stated what he observed. I think he can go into that.

MR. MORRIS: He's testifying to what Mr. Stephens knew. There's no way for anyone to know that.

THE COURT: I agree, there's no way that he could know what he knew. But he can testify that that's what – –

that's the way he appeared to him on that occasion. That's admissible.

Q (Continuing:) Go ahead.

A Yes, sir. Before the interview, he was afforded an opportunity — we asked him if he needed to go to the restroom. We offered him coffee, water, something to drink. At this time, I advised him of his rights using a standard GBI Rights Waiver card.

Q All right. Now you stated that you advised him of his rights.

A Yes, sir.

Q Specifically, please tell the ladies and gentlemen of the jury how that was done.

A At this time, we're issued standard American warning cards. I took my card from my credential case and advised him of his rights.

Q All right. And you read them from the card; is that correct?

A Yes.

Q Is that the card that you had on January 20, 1986?

A Yes, sir; it is.

Q If you would, please tell the ladies and gentlemen what rights were read to him on January 23, 1986, at the Carroll County Jail.

A "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford a lawyer, one will be appointed without cost to you before any questioning if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time you wish." I asked him if he understood each of his rights as I explained them to him and would he be willing to talk to me.

Q When you asked him if he understood those, what did he say, sir?

A Yes, sir; he did.

Q And did he agree to talk to you at that time, sir?

A Yes, sir; he did.

Q All right. Now you were aware as to the injury to his hand; is that correct, sir?

A Yes, sir; I was.

Q All right. Did he appear to be under the influence of any drugs or alcohol on that occasion, sir?

A No, sir; he was not. Again, he was responsive to questioning. His pupils dilated and responded to light. He was coherent in speech. He didn't exhibit any drunken staggering or anything of that nature.

Q All right. Concerning his hand, please, sir, did he ask for any medical attention while you were talking to him?

A No, sir; he did not.

Q Did you ever refuse him any medical attention or anything, sir?

A No, sir; I did not.

Q Now prior to taking the statement from him on January 23, 1986, did you or anyone in your presence make any promises to him in order to obtain a statement from him?

A No.

Q Prior to taking a statement from him, did you or anyone in your presence make any inducements to him in order to obtain a statement from him?

A No.

Q Prior to obtaining a statement from him, did you or anyone in your presence make any threats to him in order to obtain a statement from him?

A No, we did not.

Q Prior to your obtaining a statement from him, did you or anyone in your presence tell him that it would be any better or any worse in order to obtain a statement from him?

A No, sir; we did not.

Q And did he agree to make a statement?

A Yes, sir; he did.

Q All right. Now was that a written statement or an oral statement or what, sir?

A This particular stage, it was oral statement. I was asking questions and he was responding to the questions.

Q All right. Now concerning this statement that was taken on January 23, 1986, if you would, please tell the ladies and gentlemen how that statement was taken, sir. What happened?

A We began asking the Defendant concerning questions about how he got shot. He stated that he and Christopher Starks had been riding around prior to him getting stopped. He stated that he didn't know exactly where they were, but he did know they were in Alabama. When I explained the Hale County armed robbery/murder to him, I related the general facts, case facts as I knew them. He admitted that he and Christopher Starks were involved in the shooting. Victor related that he was shot by one of the men in the store with a shotgun when he walked in. He stated that he did not know who had shot first and he didn't know why the shooting had gone down. I asked him whose idea it was to pull the robbery and he realted it was Christopher Starks' idea to rob the store. Victor also related he had been taking LSD and cocaine prior to the robbery and therefore, couldn't remember all of the details. I questioned him concerning how much drugs he had taken and what kind and he related that he had taken — he bought a couple eight balls of cocaine in a game room and some acid or LSD. When questioned about the details of the robbery/murder, he related that there were two men in the store. One was white and the other was a black man and that it was a white man who had shot him with the shotgun. Stephens related that at this time that was when he dropped his .25 pistol. When I

questioned him concerning the vehicle they were riding in, he related that it was Christopher Starks black Nissan truck. I explained to him the food stamps and – –

MR. MORRIS: I object to what he explained, what the officer explained. Now the statement by the Defendant, I'm not objecting to, but I am objecting to any statements made by the officer.

MR. SULLIVAN: I believe he can state as to what this conversation was between the two of them.

MR. MORRIS: That's my objection to it.

THE COURT: Overruled.

MR. MORRIS: We reserve an exception.

Q (Continuing:) Go ahead.

A I explained to him that the food stamps taken out of the truck came from the Hale County store and that the weapons had been matched ballistically. He spoke up and stated, and this is a quote from him, "You have it just like it was. I don't want to talk about killing them two men anymore." He then stated that he knew he was going to die and for me to go ahead and put him in the electric chair. At this time, the interview was concluded.

. . .

Q All right. Thank you. Now drawing your attention to January 25, 1986, did you have an occasion or have a separate conversation with Victor Stephens on that occasior, sir?

A Yes, sir. On Saturday, January 25, myself and Investigator Dennis Holloway with the Carroll County Sheriff's Office interviewed Victor at the Carroll County Jail. He was again advised of his rights and signed a written waiver.

Q All right. Now let me show you what is marked as State's Exhibit No. 18, and I ask you if you can recognize State's Exhibit No. 18.

A Yes, sir. This is the original Rights Waiver I read from at the jail which he signed.

Q All right. Now the signature on that document at the bottom, sir, is whose signature?

A The Defendant's, Victor Stephens's signature is at the bottom and myself and Dennis Holloway.

Q There's some additional writing on that document. Whose writing is on there?

A The upper right–hand side is the date, place and time of the interview and that is my writing.

Q All right. Now I believe you stated that that was Victor Stephen's signature on that document?

A That's correct, yes.

Q Were you present at the time he placed his signature on that document?

A Yes, sir; I was.

Q And were you aware, as you have stated previously, that he had a wound to his hand?

A Yes, sir.

Q If you would, please relate as to how he signed that document.

A It's my understanding that the Defendant was left handed. He stated he was. He signed with his right hand, his left hand was still bandaged when I obtained the signed Rights Waiver.

Q All right. Now drawing your attention to State's Exhibit Number, I believe it's 18.

A That's correct.

Q Specifically, what rights were read to him on January 25, 1986?

A "Before we ask you any questions, you must understand your rights:

1. You have the right to remain silent.

2. Anything you say can and will be used against you in court.

3. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

4. If you cannot afford a lawyer, one will be appointed without cost to you before any questioning if you wish.

5. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time you wish.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me."

And it's signed "Victor Stephens," witness, myself and Investigator Dennis Holloway.

Q All right. Now, I believe you stated you and Dennis Holloway were present?

A Yes.

Q Anybody else besides the two of you with Victor Stephens on this occasion?

A No, sir.

Q All right. And what was his condition and appearance on this date?

A Basically, the same as before. He was responsive to questioning. He was again asked if he wanted to go to the bathroom or to have coffee or water, that type thing. He had no appearance of being under the influence of any drugs, alcohol or anything of that nature. That was almost a foregone fact since he had been incarcerated

prior to this and didn't have access alcohol. He was totally responsive and lucid.

Q Now drawing your attention again to the injuries to his hand. Did he ask for any medical attention on January 25, 1986?

A No, sir; he did not.

Q Was any medical attention refused to him by yourself or Sgt. Holloway?

A No.

Q Prior to taking the statement of January 25, 1986, did you or anyone in your presence make any promises to him im order to obtain that statement from him?

A No, sir; we did not.

Q Prior to taking the statement from him, did you or anyone in your presence make any threats to him in order to obtain this statement from him?

A No, sir.

Q Prior to obtaining a statement from him, did you or anyone in your presence make any inducements to him in order to obtain a statement from him?

A No, sir; we did not.

Q Prior to obtaining a statement from him, did you or anyone in your presence, tell him it would be any better or any worse in order to obtain a statement from him?

A No, sir; we did not.

Q Did he agree to make a statement?

A Yes, sir; he did.

Q All right. Now drawing your attention to January 25, 1986, how was that statement taken?

A The statement was taken again and I was asking the questions and at this time, I was writing his responses down, giving a narrative as I went. I wrote it in my hand.

Q I show you what is marked as State's Exhibit No. 54, and I ask you if you can recognize that, sir?

A Yes, sir; I can. This is the statement I took.

Q All right. That's the statement you took on January 25, 1986?

A Yes, sir; it is.

Q All right. And I draw your attention to two separate places on that document. There's a signature on there. Whose signature is that, sir?

A This is the Defendant's signature, Victor Stephens.

Q And were you present at the time he signed that document, sir?

A Yes, sir; I was.

Q And did he sign it in your presence?

A Yes, sir.

Q Now I also draw your attention to — there are several initials on there. Whose initials are they?

A Those are the Defendants. I made spelling errors, grammatic errors. I struck those words. I asked the Defendant when he read it to initial any mistakes and these are his initials next to those mistakes.

Q Was Mr. Stephens given the opportunity to make any corrections to that document?

A Yes, sir.

Q Was he given the opportunity to read that document?

A Yes, sir.

Q Was that document read to him?

A Yes, sir; it was

Q And who read it to him?

A Myself.

Q Now concerning the statement that he gave you — going back to State's Exhibit No. 54, the statement itself. There's part of it that is written and the other part is a "Q" and "A". If you would, explain that to me.

A In order to clarify points that came up during the statement at the end of the narrative, I asked him questions and his answers are preceded with an "A", and my questions are preceded by a "Q".

Q All right. Now drawing your attention to State's Exhibit No. 54 and – –

MR. SULLIVAN: Your Honor, we would like to offer State's Exhibit No. 54 into evidence at this time.

THE COURT: If there are no objections, it will be admitted.

Q (Continuing:) If you would, please read the statement Stephens gave on January 25, 1986.

A "The...robbery, I just walked into the store after Peabody went in. He had been in a while so I went in to see what was happening. When I walked in, the white man started shooting with a shotgun. I just pulled out my pistol and started shooting. We left and came back to Georgia. We went to Charlie Dalla's house. Charlie Dallas carried me to the hospital.

Q Did Peabody shoot anybody in Alabama?

A I emptied my .25 but I don't know about him.

Q What kind of gun did Peabody have?

A He had a .22 and .32. I had bought the 25 from him on Friday or Saturday. He bought some .25 and .22 shells at Wal–Mart in Carrollton." Signed, "Victor Stephen."

Q All right. Now, Charles, besides those two statements, you were not present during any other conversation with Mr. Stephens; is that correct?

A That's correct.

. . .

Circuit Court of Hale County, Alabama
Direct Examination of William E. Traylor by Prosecution
Stephens Trial
Record 654–671

WILLIAM EDWARD TRAYLOR

called on behalf of the State, was duly sworn and testified as follows, to wit:

DIRECT EXAMINATION

BY MR. GREENE:

Q State your name for the ladies and gentlemen of the jury.

A William Edward Traylor.

Q Where are you employed, sir?

A State of Alabama, Department of Public Safety. I'm a Criminal Investigator.

Q And how long have you been in law enforcement, sir?

A Probably 24 and a half years.

Q And in what capacity do you presently serve, sir?

A I'm a State Trooper Sergeant.

Q And what are your duties with the State of Alabama and the State Troopers?

A My duties at this time for the past 14 years, have been as a Criminal Investigator. As such, I investigate major crimes for the State of Alabama, and also assist other agencies such as the Sheriff's Department and Police

Departments with investigations of major crime within their jurisdiction.

Q Now, sir, specifically with reference to the case we're here about today concerning Mr. Pitkins and Mr. Bailey, on January 20th, here in Hale County, did you assist or participate in that investigation?

A I did.

Q All right. Now you basically are assigned to what area of the state?

A I'm assigned to five counties in Eastern Alabama. They're Calhoun, Talladega, Clay, Randolph and Clayburn. I work other parts of the state if need.

Q All right. Are you familiar with Carroll County, Georgia?

A I am. It joins my area over there in Clayburn County and Randolph County.

Q What towns or cities are there in Carrollton, Georgia?

A The closest city is Bowden, Georgia, and the next city is Carrollton, Georgia, which is the county seat.

Q And what towns or cities are there on the Alabama side of it that you work for?

A Wedowee.

Q Now in the course, sir, of your duties in this case, did you have occasion to come into the presence of this Defendant in this matter on the 28th of January, 1986?

A I did.

Q Do you recognize him here today?

A Yes, I do.

Q Have you ever had occasion to see or be around him prior to that time sir?

A Yes, sir; I did.

Q On the 28th, sir, where did you come into his presence?

A At the Sheriff's Office and Jail, the Public Safety Complex in Carrollton, Georgia.

Q Who else was present with you at that time, sir?

A There was Chuck Gibson and Larry Yates and Officer Boyd an Investigator with the Alabama Bureau of Investigation.

Q All right. And do you know where Chuck Gibson was assigned? What area he worked?

A Chuck worked out of Selma which included Hale County, Alabama.

Q And Larry Yates, do you know where he was assigned to work?

A Larry worked out of Demopolis. He also covers Hale County.

Q Now on this occasion, sir, how did the Defendant come into your presence? Did you get him or somebody bring him out to meet with you or how did you get together?

A He was brought to the investigator's office there by the jailer. We told the jailer that we needed to talk to him.

Q At that time, sir, did you introduce yourselves to him?

A Yes, sir; I did.

Q And the other officers?

A Yes, sir.

Q Did you go over, sir, what is generally referred to as his Rights or his so–called Miranda Rights with him on that occasion?

A Yes, sir; I did.

Q How did you do that?

A I advised him his rights right from a standard Department of Public Safety DPS Form 30, it's a standardized Rights Waiver our department uses and furnishes us for use to use.

Q All right. And did you, sir, on that occasion — would you tell us how it was that you used that form. That is, you read it and had him read it or how did you go about that?

A I read it to him and I also had him read it and asked him if he understood it and he said he did understand it and I asked him to sign his signature that he understood it. He

signed his signature and I witnessed it and Corporal Chuck Gibson witnessed it.

Q After you went over that with him, did you ask him if he was willing to speak to you?

A Yes.

Q Did he agree to speak with you on that occasion?

A Yes.

Q Do you have the original of that form, sir?

A No, sir; I believe that Investigator Chuck Gibson has the original.

Q When did you begin interviewing the Defendant concerning this case, sir?

A You mean when did I first have the interview?

Q No, sir. This case on this occasion that we're speaking of on the 28th, what time of day did you begin that interview?

A That interview was started at 1:35 p.m. He was advised of his rights at 2:45 from the Rights Waiver.

Q So you began on this case at 2:45; is that correct?

A Yes, sir.

Q Now when did you conclude, sir, in your best judgment?

A I would say approximately 3:45.

Q All right. And during that period of time, sir, did you or anyone in your presence or to your knowledge offer this Defendant any promises or hopes of reward in order to get him to speak to you concerning this matter on that occasion?

A No, sir.

Q Did you threaten, coerce or attempt to threaten or coerce him or offer him any inducement on this occasion to get him to speak to you?

A No, sir; did not.

Q During this time, sir, were you made aware of or did it come to your attention or did you recognize whether or not the Defendant was suffering from the affects of any drugs or alcohol during the course of this interview?

A In my opinion, he was not because -- can I clarify when I say that?

Q Let's leave it in your judgment that he was not.

A All right.

Q Now on that occasion, sir, were you familiar with any injuries or wounds that he might have had?

A I was.

Q And what was that?

A A gunshot wound to the left hand.

Q All right. Did he complain of any problem or difficulty with that during this period of time?

A No, sir; he did not.

Q And to your knowledge, was he on any medication or drugs as a result of that injury at that time?

A No, sir; not to my knowledge.

Q All right.

(Whereupon State's Exhibits Nos. 72 and 73 were marked for identification by the reporter.)

(Whereupon an off–the–record discussion was held between counsel and the Court.)

THE COURT: Ladies and gentlemen, we'll have to take up a matter outside your presence. That will give us an opportunity to have a break. I'll give you a break for 15 minutes. Now I would admonish you again not to discuss this case among yourselves or with anyone else or allow anybody to discuss it with you.

(Whereupon the following proceedings were held out of the presence and hearing of the jury:)

MR. GREENE: Previously, Judge, in private consultation with defense counsel, we're both very aware of this particular problem and this was covered, I think, at the Motion to Suppress hearing. But testimony previously is in the record that the interview began at 1:35 p.m. on this occasion and that is a true fact as has been truly testified to. Now there's a Rights Waiver which is Exhibit No. 10, presently identified as an exhibit in this case. We represent as defense counsel is well aware, that that interview deals with a robbery occurring in a

county, Randolph County, I think, and as such, we do not intend and have never intended to go into it. My question in attempting to establish the length of time he was with the Defendant was perhaps poorly framed, but in any event, it elicited an answer saying that he started at 1:35. The interview in this case began at 2:45, and for the record, Mr. Traylor, I would like to ask you at this time, you did begin your interview with the Defendant, Stephens, at 1:35 p.m., on the 28th; is that correct?

THE WITNESS: That's correct.

MR. GREENE: And you did interview him at that time and at the same place, same city, same circumstances that you've just previously testified about?

THE WITNESS: That's correct.

MR. GREENE: You went over his rights with him at that time?

THE WITNESS: Yes, sir.

MR. GREENE: And you read him all the rights on the page?

THE WITNESS: Yes, sir.

MR. GREENE: And he agreed to speak with you by waiving those rights; is that correct?

THE WITNESS: Yes, sir. I advised him of another Rights Waiver. There are two different cases.

MR. GREENE: Is that State's Exhibit No. 10 that's here?

THE WITNESS: Yes.

THE COURT: Why can't you just say you previously advised him of his rights in another —

MR. GREENE I can do that.

MR. MORRIS: He advised him at 1:30 of his rights and —

MR. GREENE: Advised him again at 2:45.

THE COURT: Just don't give any reason for it. Just you did twice and you did it once prior to that. I think that cures it. You don't want to leave the jury with the idea though that you went on and carried on a conversation with this guy and then decided later sometime —

MR. GREENE: After 1:35 and after the rights were given, I think this is all already covered, but I think I need to go over it. Were any threats, promises or hopes of rewards or coercions or inducements or any attempts on your part to force or coerce or threaten him into speaking with you during the first interview?

THE WITNESS: Was not.

MR. GREENE: All right. Y'all did, of course, discuss another separate robbery after the 1:35 p.m. Rights Waiver?

THE WITNESS: That's correct.

MR. GREENE: Then at 2:45 p.m., you began a discussion of the case we're here about today.

THE WITNESS: That's correct.

MR. GREENE: All right. And then, of course, a written statement was taken in both matters.

THE WITNESS: That's correct.

MR. GREENE: Now what is marked as State's Exhibit No. 11, this is the information or statement that was taken pursuant to the other robbery in your county pursuant to State's Exhibit No. 10, the 1:35 p.m. waiver; is that correct?

THE WITNESS: That's right.

MR. GREENE: Of course, these are pieces of evidence that have been brought over from Randolph County.

THE WITNESS: That's correct.

MR. GREENE: By the clerk.

MR. MORRIS: You're not offering these?

MR. GREENE: Only for the record to clarify the record as to what the situation is.

THE COURT: Each time you investigate a different event, you again advised him of his rights; is that basically correct?

THE WITNESS: That's correct. Because different crimes, different jurisdictions, we felt that that should be on separate confessions and kept separate for the courts.

THE COURT: I think it's a true statement though that prior to this advice of rights, you had previously advised him of his rights; is that correct?

THE WITNESS: That's correct.

THE COURT: All right.

MR. MORRIS: I do renew my objection for the record. I object to the whole thing, starting with Monday.

THE COURT: Your objection is noted.
(Whereupon the following proceedings resumed in the presence and hearing of the jury:)

Q (By Mr. Greene, Continuing:) Now, sir, showing you State's Exhibit No. 72, sir, I ask you if that is the Rights Waiver you previously referred to , sir?

A It is.

Q And did you, on that occasion, sir, put the handwriting on that form?

A I put my name on that form, yes, sir.

Q All right. What is State's Exhibit No. 72?

A That's a standard Rights Waiver used by our department, the Department of Public Safety. It advises the person of their constitutional rights that's spelled out by the courts of the United States. It has a waiver part at the bottom that you ask the person if they understand their rights and if they're willing to talk with you and give you a statement.

Q And this is the form you used on the occasion as previously testified?

A That's correct.

Q And now you have, of course, signed it yourself, it bears your name and witnessed by Corporal W. C. Gibson.

A Yes.

Q Did you witness him sign it?

A Yes.

Q And also signed "Victor Stephens" and dated January 28, 1986. Did you witness that signature?

A I did.

Q And who signed that, sir?

A The Defendant, Victor Stephens.

Q Did he also put the date on there, sir, or someone else put it on there, do you recall?

A I don't recall who put it on there.

Q At the top it has, name, address, education, place, date and time. Do you know who put that on there?

A I believe that Chuck Gibson or Larry Yates put that there, either one.

Q It was there on the form when you used it?

A Yes, sir.

Q Were those things observed in your presence?

A Yes.

Q All right. Now, is this document, sir, in the same or substantially the same condition as it was when it was completed and signed and dated by you on that occasion?

A It is.

Q All right.

MR. GREENE: We move the introduction of State's Exhibit No. 72.

THE COURT: It will be admitted.
(Whereupon State's Exhibit No. 72 was offered and received in evidence.)

Q (Continuing:) Now, previously, sir, you indicated that this interview was begun at 1:35; is that correct?

A That's correct.

Q And did you also go over the Defendant's rights with him at 1:35?

A I did.

Q And do you have, sir, a copy of that — excuse me. I show you State's Exhibit No. 10, sir, and ask you if that's the Rights Waiver you went over with the Defendant at that time?

A It is.

Q All right. And at that time, sir, did you execute that Rights Waiver at that point in time?

A I did.

Q And did the Defendant execute it also?

A Yes, sir; he did.

Q Were there any offers or promises or hopes of reward or threats or coercion or intimidations offered to the Defendant at all in order to get him to sign this Rights Waiver?

A No, sir.

Q Is this document in the same or substantially the same condition now that it was at the time it was completed at 1:35 p.m., on January 28, 1986?

A It is.

Q All right.

MR. GREENE: We move the introduction of State's Exhibit No. 10.

THE COURT: Be admitted.
(Whereupon State's Exhibit No. 10 was offered and received in evidence.)

Q (Continuing:) Now, sir, on this occasion at 2:35, was in fact, there an interview with the Defendant, Victor Stephens?

A Yes, sir; there was.

Q I show you State's Exhibit No. 73, consisting of four pages, and I ask you if you would, to examine that exhibit, please, sir. Can you tell us what that is, sir?

A Yes, sir. It's the original copy of the statement taken from Victor Stephens on the 28th.

Q All right. And now I said four pages, I'll correct that to three pages.

A Yes, sir.

Q Now ABI Investigator Yates, was he present also?

A Yes.

Q Could you tell the jury, please, sir, how this interview was conducted and how this written document, Exhibit No. 73, was prepared.

A Victor Stephens was asked questions and he was asked to tell us what happened on the Hale County robbery and he relayed to us what happened and Larry Yates, investigator with us, was taking these notes down as he was telling us. After this was reduced down to writing, it was gone over with Victor Stephens and he signed it as being correct.

Q All right. Now after it was completed by Officer Yates, you and Gibson discussed it and did you go back over it with him?

A Yes.

Q Did you make any corrections or additions or initial it in any way?

A Yes, sir. Corrections were marked out and Victor Stephens put his initials there to show that the corrections were made in his presence.

Q All right. And he signed it and agreed that that was his statement about what happened on that occasion?

A Yes, sir; that's right.

Q All right. Is this document, sir, State's Exhibit No. 73, now in the same or substantially the same condition as it was at the time it was completed on that occasion by Mr. Stephens and yourself and Mr. Gibson and Mr. Yates?

A It is.

Q All right.

MR. GREENE: We move the introduction of State's Exhibit No. 73, and ask permission for the witness to read the statement to the jury beginning with the narration, leaving out that portion having to do with the introduction — if that's permissible, Mr. Morris. Would you like to see that?

Q (Continuing:) If you would, sir, read the statement to the jury, beginning with the paragraph that begins with a narration of events leaving out the introductory matters, please.

A "We went to New Orleans on Saturday night or early Sunday morning the 18th or 19th. This is the first time I

had been to La. with Peabody (Starks). We left La. early Monday morning 1/19/86. We came up the Interstate and turned off the Interstate after we crossed into Alabama.

After we came across a long bridge in Alabama, Peabody kept saying, 'he needed some money.' After we crossed the bridge, we pulled over to this store to get gas. Peabody said 'he needed some money.' I told him I had enough money to get us home.

When we pulled up to the gas pumps a white man came out and pumped us $10 worth of gas. I asked the man if he had a bathroom and he said 'no.' I got back in the truck and smoked a cigarette. Peabody went into the store. He stayed he the store a long time and I walked up to the store and opened the door, then this white man shot me in the hand. I fell to my knees and pulled my gun (.25 cal. automatic) out of my right rear pocket and started shoting. I don't even know if I shot anybody or not. The white man was standing to my left when he shot me with the shotgun. Peabody came running by me yelling 'let's go, let's go.' We ran out and jumped in the truck I didn't make it in time.

Going down the road Peabody asked me where my gun was. I told him, 'I left it at the store.' He said you really fucked us up this time.' I kept telling Peabody I was hurt, take me to the hospital and he wouldn't do it. He gave some gin and some rags to wrap my hand and then I laid down and went to sleep.

After we got back to Georgia, Peabody took me by Charlie Dallas's house. Dallas took me to the hospital in Bowdon, GA.

At the hospital I told my mother to get my coat and she did. She also got some money, about $30 or $40 out of my coat pocket."

Signed, "Victor Stephens."

Q All right. That was in fact the statement that was written and y'all did complete that on that occasion with this Defendant?

A That's correct.

Letter to Chief Judge Dewey Smith, Coweta Judicial Circuit,
July 25, 1989.
D–178

[Letterhead]

Hon. Dewey Smith, Chief Judge
Coweta Judicial Circuit
P.O. Box 623
Carrollton, Georgia 30117

RE: *State of Alabama v. Victor Remar Stephens (murder case)*
State of Alabama v. Christopher Starks (murder case)

Dear Judge Smith:

As you were previously made aware, sentencing hearings were scheduled in the above causes for yesterday, Monday, July 24th. These hearings were held, and since you are away from your office in conference, Judge Thigpen asked that I take this means to let you know his sentencings in each case.

In the case of Victor Remar Stephens, Judge Thigpen sentenced him to death.

In the case of Christopher Starks, Judge Thigpen sentenced him to life without parole.

If you wish to discuss the above causes with Judge Thigpen further, do not hesitate to contact me, and I will have Judge Thigpen get in touch with you as soon as possible.

Very truly yours,

Dottie Greer,
Secretary to Hon. Charles A. Thigpen

/dbg
cc: Circuit Clerk, Hale County, Alabama

Circuit Court of Hale County, Alabama

Defense Counsel's Opening Remarks

Stephens Trial, Penalty Phase

Record 908–912

PENALTY PHASE

DATE: July 24, 1989

BEFORE: HON. CHARLES A THIGPEN, Circuit Judge

(Whereupon State's Exhibits Nos. 1, 2 and 3 were marked for identification by the reporter.)

THE COURT: State ready?

MR. SULLIVAN: State's ready.

THE COURT: Defense ready?

MR. MORRIS: Defense ready, Your Honor.

THE COURT: You may open.

MR. SULLIVAN: Your Honor, we're here today on the sentencing of Victor Remar Stephens. As the Court knows from your experience of trying this capital case, this office has never asked you at any time to override a jury verdict. Today, we're doing that for the first time. When I was looking through the aggravating and mitigating circumstances out of consideration for the Court, the statutory mitigating and aggravating circumstances, I was able to look particularly at the mitigating circumstances and was able to make a

determination that there's not one mitigating circumstance that fits Mr. Stephens in this case. As the Court is aware, there are seven statutory mitigating circumstances. The history of violence of Mr. Stephens is probably unparalleled in this area. We'll introduce for the Court's consideration, five additional felonies showing that in 1981 Mr. Stephens was convicted of four burglaries and one theft by receiving stolen property all in Carroll County, Georgia. We have exemplified copies here and we would introduce them. We would like the Court to consider that in our recommendation in effect to override the recommendation of life without parole and sentence Mr. Stephens to death.

MR. MORRIS: Your Honor, I'll be brief. During the course of striking of this jury, there were a number of venire members, jury members that answered that they either knew or had contact or knew of each of the deceased. I believe the record would reflect of those at least two to three people sat on the jury itself. None of the venire acknowledged knowing anything of Mr. Stephens personally. This case was tried, both aspects of this trial was tried. None of the aspects that Mr. Sullivan brought to the Court's attention were kept from the jury's consideration when they recommended that he be sentenced to life without parole. The mere fact, I'm saying this to the Court, is that I think it would

be certainly an unprecedented act for the Court to invoke its own judgment when a jury had every bit of the information available, coupled with the personal knowledge of the deceased. None of which was available to the Defendant in this case.

We just merely ask this Court to follow the dictates of the people of Hale County, a cross–section that included black and white and their wishes and their recommendations to this Court that Mr. Stephens' life be spared and that he be sentenced to life without parole. We think the jury made that determination on all of the circumstances and recommended that to the Court and we would ask the Court to merely follow the recommendation of the jury of not only the deceaseds, but a jury of the peers of the Defendant.

MR. SULLIVAN: Your Honor, at this time, we would like to offer for the Court's consideration, five prior felony convictions of Victor Remar Stephens. First, is State's Exhibit No. 1, and it reflects a three–count indictment including the sentencing order that reflects three burglary convictions showing in effect that he was represented by counsel, being a Charles A. Lumpkin, Jr., Carroll County, Georgia, and was sentenced to a period of eight years to run concurrent with each other, Counts I, II and III. Now this was on January 16, 1981.

I would like to offer those for the Court's consideration.

I would like to offer State's Exhibit No. 2, showing that Mr. Stephens entered a plea to burglary. He was also sentenced pursuant to that and he was represented by Charles A. Lumpkin, Jr., and he was sentenced to a period of six years in the state penitentiary in the State of Georgia.

I would like to offer State's Exhibit No. 2. I would also like to offer State's Exhibit No. 3, showing Victor Remar Stephens was convicted of the offense of theft of stolen property and that was also in 1981 and sentenced to a period of six years in the state penitentiary. He was again represented by counsel, being Charles Lumpkin, Jr. This was in Carroll County, Georgia, and he was sentenced to a period of six years in the state penitentiary. He was again represented by counsel, being Charles Lumpkin, Jr. This was in Carroll County, Georgia, and he was sentenced to a period of six years in the state penitentiary. I would like to offer those for the Court's consideration at this time.

MR. MORRIS: We object to those. The introduction of those documents, Your Honor, we object to.

THE COURT: Grounds.

MR. MORRIS: Judge, that those — that those documents were available in the prior trial to the jury as well as to the Court.

THE COURT: I believe it was admitted.

MR. MORRIS: It was admitted at that time. It was not denied.

THE COURT: I'll overrule. Be admitted.

MR. SULLIVAN: State has no further evidence at this stage, Your Honor.

THE COURT: Further from the Defense?

MR. MORRIS: No, sir; Your Honor.

Supreme Court of Alabama
Petition for Writ of Certiorari and Brief of Appellant
Stephens Appeal

STATE OF ALABAMA JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

* * * * * * * * * *

VICTOR R. STEPHENS,

Appellant,

vs. SC Case No.

THE STATE OF ALABAMA,

Appellee.

On Appeal from the Circuit Court of
Hale County, Alabama
Hon. Charles A. Thigpen, Judge

PETITION FOR WRIT OF CERTIORARI AND BRIEF OF APPELLANT, VICTOR R. STEPHENS

OF COUNSEL:

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IN THE SUPREME COURT OF ALABAMA

VICTOR R. STEPHENS, Appellant,	*	APPEALED FROM THE CIRCUIT COURT OF HALE COUNTY, ALABAMA
vs.	*	
STATE OF ALABAMA, Appellee.	*	SC Case No. _____

PETITION FOR WRIT OF CERTIORARI

Comes now the Appellant, Victor R. Stephens, by and through his attorneys of record, Blanchard L. McLeod, Jr., and J. Patrick Cheshire, and petitions this Honorable Court for a Writ of Certiorari to issue to the Court of Criminal Appeals in the above styled cause under Rule 39 of the Alabama Rules of Appellate Procedure, and in support thereof, assigns the following, separately and severally, to–wit:

(1) Petitioner was convicted of the charge of capital murder in the Circuit Court of Hale County, Alabama on December 17, 1987, and sentenced on July 24, 1989. The Alabama Court of Criminal Appeals affirmed the judgment of the trial court with opinion on August 3, 1990. An Application for rehearing was filed on August 17, 1990, and was overruled without opinion on September 21, 1990.

(2) With the application for rehearing, the Petitioner presented additional and corrected statements of fact pursuant to Rule 39 (k), ARAP, and requested the Alabama Court of Criminal Appeals to add or correct said facts in its opinion on re–hearing, which it failed to do. A copy of said additional and

corrected statement of facts are attached hereto and marked Exhibit "A", and incorporated herein by reference as if set out verbatim.

(3) The Alabama Court of Criminal Appeals case number is 2 Div. 738.

(4) The basis of this Petition for Writ of Certiorari is that the decision of the Court of Criminal Appeals failed to adequately address the issue of whether or not the prosecution performed misconduct under the principles set forth in *Ex parte Branch*, 526 So.2d 609 (Ala. 1987) and *Batson v. Kentucky*, 476 u.s. 79, 106 S.Ct. 1712, 90 L.Ed. 69 (1986), where the prosecution used 21 of its 22 peremptory strikes (95.45%) to strike blacks from the jury venire.

Batson at page 1717 states, "[t]he Equal Protection Clause (Amend. 14 U.S. Const.) guarantees the defendant that the state will not exclude members of his race from the jury venire on account of race." Sections 1, 6 and 22, *Ala. Const.* 1901, combine to guarantee Equal Protection of the law.

Recently, the Alabama Supreme Court issued the opinion of *Ex parte Mary Williams*, S.Ct. Case No. 89–597, released June 22, 1990. In the *Williams* case, the Alabama Supreme Court stated on page nine:

> "With the prima facie case established, there is a presumption that the peremptory challenges were used to discriminate against black jurors, *Branch*, at 623; *the State then has the burden of articulating a clear, specific, and legitimate reason for the challenge that relates to the particular case to be tried and that is nondiscriminatory.*" (emphasis added).

It is more than obvious in the opinion of the Alabama Court of Criminal Appeals that the court sought any and every means possible and totally disregarded the *Batson*, *Branch*, and *Williams* guidelines to effectively deny your appellant Equal Protection under the United States Constitution and the Alabama Constitution.

Your appellant would specifically cite the opinion of the Alabama Court of Criminal Appeals on pages eight and nine wherein the court states as the total basis for the logic in disqualifying the following jurors:

> "8. Ms. Spence—sons had been involved in 'some very serious criminal offenses.'
>
> 9. Ms. Johnson—had been a defendant in small claims court and been served with numerous civil suits; appeared to be extremely responsive to the defendant's questions; also, the fact that she was chewing gum was felt to indicate her lack of respect for the seriousness of the proceedings.
>
> 11. Mr. Pratcher—although his permanent legal residence was in Hale County, he was currently living and working in Atlanta, Georgia; seemed to be interested in not serving on a jury; also was wearing sunglasses in the courtroom; also, at some time during voir dire proceedings, sat next to or appeared to have some sort of relationship with a juror excused for cause because of his views against capital punishment.
>
> 13. Ms. Shelton—prosecution found it 'extremely strange' that every juror from her small community except her had heard something about the crime since it occurred in that community; also very insistent about giving her marital status as separated.
>
> 15. Ms. B. Wilson—county sheriff was acquainted with juror and recommended that she

be struck because she was 'extremely anti-establishment' and because of belief that her husband had been involved in some type of criminal activity.

16. Ms. A. Harris—young, single, and unemployed; knew nothing of the facts surrounding the case.

17. Mr. K. Williams—general appearance was very rough and unkempt; also, like Juror Pratcher, appeared to be involved with a juror struck for cause because of his views against capital punishment.

18. Ms. Brown—husband a homicide victim; however, sheriff's department was concerned about her as a juror because of her belief that her husband's case had been mishandled.

19. Ms. Hayes—seemed totally removed from the situation; felt that this might indicate animosity on her part, since she worked at the nursing home where the wife of one of the victims now lived.

21. Ms. S. Harris—relatives had been in trouble with the law."

None of these strikes outlined above can in *any* way have "...clear, specific and legitimate reasons for the challenge that relates to the particular case to be tried and that is nondiscriminatory." *Branch*, at 623 as cited in *Williams* at page nine. Further, the Alabama Court of Criminal Appeals *totally* disregarded its own *Avery*, *Madison* decisions as well as *Branch* and *Batson* when it failed to even address the following point raised by your appellant.

The justification for the State's strikes ranges from ridiculous (chewing gum, (R–390, 391), to the sublime (wearing sunglasses, R–391). However, in *all* instances where the State

indicated that it might have some information that was gained by investigation prior to voir dire, the State *never* tried to investigate this information in any manner during voir dire. As the court stated in *Avery v. State*, 545 So.2d 123 (Ala.Cr.App. 1988), "[t]he prosecutor could have resolved her suspicions on voir dire, but she did not do so," at page 127.

"A prosecutor's failure to engage black prospective jurors, 'in more than desultory voir dire, or indeed to ask them any questions at all, before striking them peremptorily, is one factor supporting an inference that the challenge is based on groups bias.' " *People v. Turner*, 42 Cal.3d 711, 726 P.2d 102, 230 Cal.Rptr. 656 (1986). Cited in *Avery*, supra, at page 127. As the court affirmed in *Madison v. State*, 545 So.2d 94 (Ala.Cr.App. 1987) at page 99, "[a]s noted in *Ex parte Branch*, 526 So.2d 609 (Ala. 1987), the absence of voir dire questions directed to the challenged jurors must be weighed against the prosecution." The prosecutor, in this instant case, had the right of almost unlimited voir dire (within reason) to either confirm or deny his suspicions. But, he *never* chose to do so. Therefore, one *must* assume the systematic group exclusion of blacks. The very thing *Batson* sought to protect.

Additionally, the State justifies its strikes with reference to chewing gum, (R–390, 391), and wearing sunglasses, (R–391), upon its intuition. "Furthermore, intuitive judgment or suspicion by the prosecutor is insufficient to rebut the presumption of discrimination." *Branch*, supra, at page 623 citing *Batson*, supra, at page 1723.

(5) The basis of this Petition for Writ of Certiorari is that the decision of the Court of Criminal Appeals failed to adequately address the issue of whether or not the trial court abused its discretion in denying defendant's Motion for Mistrial based upon prosecutor's comment during closing arguments that the attorney for the defendant was attempting to hide evidence

form the jury since such statement was ineradicably prejudicial and imparted to the jury the impression that the defense counsel was engaged in an illegal activity in denying the jury access to all evidence in the case.

While it may be within the realm of fair comment for the prosecutor to attempt to address points raised by the defendant's counsel in closing argument, to allow a personal attack upon the veracity of counsel for the defendant is extremely prejudicial in that it focuses the attention of the jury away from the facts in dispute onto the personality and reputation of counsel.

(6) The basis of this Petition for Writ of Certioari is that the decision of the Court of Criminal Appeals failed to adequately address the issue of whether or not the State prosecutor committed reversible error when he tried to impeach the defendant for an offense for which he was not convicted.

The Court of Criminal Appeals used the Harmless Error Rule in upholding this reversible error. But, how can the error be harmless when the defendant testified for the mitigating circumstance of remorse and repentance of his previous life of crime. Although it may be proper for the prosecution to cross examine the defendant regarding prior criminal convictions, it is extremely prejudicial to the appellant's argument for the prosecution to address possible criminal activity that has never been proven and of which the appellant has never been arrested.

(7) The basis of this Petition for Writ of Certioari is that the decision of the Court of Criminal Appeals failed to adequately address the issue of whether or not there was insufficient evidence adduced at trial to sustain a conviction as well as a failure of the State to carry the burden of proof with regard to the offense of capital murder: therefore, it was reversible error for the trial court to deny the defense motion for a directed verdict of acquittal at the conclusion of the State's case, as well

the defense motion for a judgment of acquittal at the conclusion of the trial.

The decision of the Court of Criminal Appeals hinges only on the allowabililty of circumstantial evidence. The court totally fails to acknowledge the dying declaration of the only eyewitness to the offense. The court does cover in its statement of the facts when it states on page seven:

> "The only evidence presented by the defense was in the form of testimony from Jessie Portis. Mr. Portis testified that he arrived at Bailey's store after Mr. Bailey and Mr. Pickens were shot. He leaned down and asked Mr. Pickens if he could say what color vehicle the robbers were in. According to Mr. Portis, Mr. Pickens responded that the robbers were in a red vehicle. When asked if the robbers were white or black, Mr. Pickens stated, 'white.'"

(8) The basis of this Petition for Writ of Certiorari is that the decision of the Court of Criminal Appeals failed to adequately address the issue of whether or not the death penalty imposed by the trial court judge in this cause should be reversed.

There is absolutely no justification stated in the August 3, 1990 decision of the Alabama Court of Criminal Appeals which would provide any facts to the trial court that were not known to the trial jury that would justify the reversal by the trial jury when it imposed life without parole in this case.

(9) The basis of this Petition for Writ of Certiorari is that the decision of the Alabama Court of Criminal Appeals failed to adequately address the issue of whether or not death by electrocution as applied by the State of Alabama constitutes

cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the Untied States of America and Article 1, Section 15 of the Constitution of the State of Alabama.

In light of recent developments concerning the reconditioning of the Alabama electric chair as a result of the necessity of using repeated shocks to bring about the death of the condemned individual which has been widely reported in the press, the court should take judicial knowledge thereof.

(10) In light of the recent study of the United States General Accounting Office, the Alabama Supreme Court should consider the issue of whether or not the application of the death penalty is discriminatory in nature, and, therefore, violative of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution of America and the appropriate provisions of the Alabama Constitution (1901). A copy of this United States General Accounting Office report is annexed and marked as Exhibit "B" to this Petition for Writ of Certiorari. Because of this recently discovered evidence, your Petitioner is presenting this issue in this Petition for Writ of Certioari and will file a supplemental brief with reference to this issue.

WHEREFORE, your Petitioner respectfully requests that after preliminary examination, this Writ of Certiorari be granted and that this Honorable Court proceed under its rules to review this matter complained of, and to reverse the judgment of the Alabama Court of Criminal Appeals, and for such other relief as your Petitioner may be entitled.

Submitted in support thereof is the Brief with Argument of your Petitioner.

Respectfully submitted,

Blanchard L. McLeod
Of Counsel for Appellant

Exhibit "A"

STATEMENT OF THE FACTS

On or about January 20, 1986, a robbery took place in Hale County, Alabama at Bailey's Grocery Store located on Highway 14, (R–167). During this robbery two men, Mr. James R. Bailey, age 72 and Mr. Adam Pickens, age 82, were killed, (R–166).

On January 21, 1986, Charles S. Stone of the Georgia Bureau of Investigation, Dennis Holloway of the Carroll County, Georgia Sheriff's Department, Chief Deputy A. S. Manley of the Randolph County, Alabama, Sheriff's Department and A.B.I. Agent Ed Trayler interviewed Mr. Victor Ramar Stephens at the Carroll County Hospital, in Carroll County, Georgia, where he was being treated for a gunshot wound to his left hand, (R–39). During the course of this interview, Mr. Stephens stated to these representatives of law enforcement from the States of Georgia and Alabama that he had been shot the previous day at approximately 6:00 p.m. by an individual named Dennis Johns. At that time, the interview was terminated, (R–39, 40). Mr. Stephens was taken into custody for suspicion of involvement in two robberies, one occurring in Carroll County, Georgia, and the other occurring in Randolph County, Alabama, (R–59). Subsequent interviews with Mr. Stephens were held at the request of Mr. Stone and Mr. Trayler at the Carroll County Jail on the days of January 23rd and January 25, 1986, (R–27). During the course of the interview that took place on January 23, 1986, Mr. Stone stated that he did not recall whether or not Mr. Stephens had requested Mr. Stone to aid him in getting some relief for the pain he was feeling in his injured hand in exchange for a statement concerning the offenses with which he was charged, (R–41).

As a result of the statements acquired from Mr. Stephens by Officer Stone and Trayler, Mr. Stephens was extradicted to Hale County, Alabama and was subsequently indicted for the capital murders of Mr. James R. Bailey and Mr. Adam Pickens.

The following is the transcription of the *Batson* motion, argument of counsel and the justification to the Court for the strikes of the black venire persons:

> "Mr. Morris: Judge, I would offer to the Court, a brief, or would bring to the Court's attention, a motion previously filed. The Court is aware of *Batson* Motion, and *making it known to the Court that the basis of the Batson Motion is that of the 22 jurors struck, which is not including the alternate, the first 21 were black. The other juror that was struck by the State was juror number 22, which was their last strike and they struck number 106, which was Mr. Wyatt.* (emphasis added). We feel like under the language, that it's clear that through the process of jury striking, that they have systematically excluded members of the black race. Further, for the record, my client (R–386) is black and we feel like that is a violation of the *Batson* case.
>
> THE COURT: What is the composition of the venire total?
>
> MR. GREENE: As I understand it, it's seven white, five black.
>
> THE COURT: The jury as struck is seven white and five black.
>
> MR. GREENE: I think so.

THE COURT: What is the composition of the venire as a whole?

MR. GREENE: We've got it right here. Mr. Corley, number 17 is a white male. Mrs. Ferguson is a white female. Ms. Fondren, number 29, is a white female. Mr. Brenstead, is a white male, Lyles is a black female, Marks is a black female, 82 is a black male, 92, Travis, is a black female, 94, Tucker, is a white female, and 96 is Beth Williams, and that's a white female, and 101 is Willie Williams, a black female, and the alternates are Michael G. Harris, number 38, a white male, and Mr. Tubbs, number 93, white male.

THE COURT: Who's the last juror struck?

MR. GREENE: Number 106, Mr. Wyatt.

THE COURT: Last juror? The last juror, number 38, (R–387) that was the last person struck, period, was number 38, Michael G. Harris, by the State; is that correct?

MR. MORRIS: That's true, as an alternate.

THE COURT: All right. The composition of this jury is seven and five. Now depending on the alternates, it could be eight and four.

MR. GREENE: Eight and five if you keep the alternate.

THE COURT: All right. *You've made a prima facie showing, justify your strikes.* (emphasis added).

MR. GREENE: First of all, we did not attempt to strike jurors solely because of their race. We did, however, strike jurors for reasons I would like to state in

the record at this time. I'll try to take them in order and state those reasons as best I can.

We struck juror number 68, Mr. Mickens, his position on capital punishment, which, I think is already of record.

We struck juror number 4, Mrs. Ball, on her position on capital punishment.

We struck juror number 5, who's also a Ball, as I understand it. Mr. Ball, the information was that he had answered affirmatively on drugs, that is, that he, or some member of his family or (R–388) some personal friend being so involved. The information also received was that he was some sort of part–time preacher and that his son had been in some serious trouble dealing with drugs and/or criminal activity. That was from law enforcement investigation. Finally, he indicated he did not want to serve and would ask to be let off, as we understood it. Now number 76 was our next strike, and that was Mr. Patton, who had answered affirmatively on our question concerning previous knowledge or association of any type of criminal offense. Our office had prosecuted him for night hunting. We seized his weapons and sold them and he had also been convicted of a DUI on other occasions.

Number 47 was a Margaret Hood, and we struck her because she asked off and had quite a bit to say about lack of transportation and inability to get here and she was concerned and wouldn't be able to pay attention, etc. Finally, it seems as if she and her husband have a history or problem in the child support court. Her husband actually being prosecuted and even done some time in the jail with reference to that. Of course, our office handles the child support program. Now that was in

Perry County, there was (R–389) some type of connection, a cousin or something. That's the reason we're so familiar with them.

Number 46 was a Mattie Hollifield. We struck her because she had been arrested and charged with worthless checks and similar type offenses on several different occasions.

We struck juror number 36, which was Carolyn Harris. The information gathered during voir dire was that she was young, single and unemployed and our information in our investigation prior to that was that her brother is a defendant or has been a defendant in a criminal case which is being prosecuted.

We struck juror number 87, Vinie P. Spence. The information was that her sons had been in some very serious criminal offenses. We just felt like she would not be a good State's juror in this case.

We struck juror number 49, Dorothy Johnson. Information from investigation was that she had been a defendant in small claims court and been served with numerous civil suits. She was not particularly well thought of and recommended to us as a juror to strike. In voir dire, she seemed to be extremely responsive to the Defendant's questions. I noticed that she was (R–390) chewing gum and not particularly concerned about this and felt like she would not be a proper juror to serve on this jury.

Number 18 was our 10th strike, Betty Cottrell. She asked off this jury. She did not want to serve and she answered our questions with reference to involvement and knowledge of criminal activity in the affirmative.

She indicated that she or someone very close to her had been charged with some criminal offense.

Our next strike was number 80, Willie Pratcher. This is the juror who indicated that he lived in Atlanta and seemed to be interested in not serving. He was wearing sunglasses and that to me has always been a point. When I find jurors doing that, unless there's a real good reason for it, generally, they do not tend to make very good State jurors. He's the only one in that position. He also was sitting next to a Mr. Gray. Defense counsel brought to the Court's attention, of course, our attention at the same time, that Mr. Gray, a juror struck for his feelings on capital punishment, had approached defense counsel discussing or talking or making some comments about burning the guy or something of that nature and Mr. Pratcher seemed to have (R–391) some type of relationship with him. I felt uncomfortable leaving him on the jury knowing the propensity of the Juror Gray to verbalize his position.

Number 59 was struck as our 12th strike. That's Miss Gracie M. Lewis. Our information is that she was single and unemployed. Also, our investigative information indicated that her son had been involved in a death or a killing. Information was not clear as to whether it was some type of automobile accident or whether it was some criminal charge, but in any event, her son was involved in it in some manner and we felt like she could not stay on as a juror.

Our 13th strike was number 85, Willie Shelton. I think it's Shelton. This juror, in the course of individual voir dire, is from community and, of course, was listed here, her marital status here, as separated. She was very insistent on that. She reported that she lives in this particular community and never heard anything about

this case whatsoever. We find that extremely strange and based on that, felt like she should not remain as a juror in this case.

Number 97, Essie Lee Williams, on individual (R–392) voir dire, she seemed to be familiar with the case which, being from the general area of this offense, that would seem to be a plus, but her individual voir dire, she seemed to be very concerned and communicated to us that she was well aware of the fact that one of the men had lived to tell all about it and she was waiting very much to hear that. Seemed to be very concerned about that. Of course, we're very familiar with the evidence in this case where there is a proposed dying declaration from the deceased, "Pop", indicating some words to the effect that some two white men did it. We felt that leaving her on the jury with anticipation of testimony would certainly be detrimental to us.

Our 15th strike was 102, Bertha L. Wilson. Sheriff's Office recommended this juror be struck. The Sheriff himself indicated he had known her for quite a long time and felt that she was extremely anti–establishment. That her mother was considered by him to be a person he thought well of, but he was concerned with Mrs. Wilson. He believed that her husband had been previously in some type criminal trouble. We felt that during the voir dire, she seemed to (R–393) be very unconcerned about this very serious matter that she was about. We struck her on that basis.

Our 16th strike was number 35, Annie Harris. She had reported from her information as being single, unemployed and relatively young. The note I made was that she knew nothing about the case.

Our 17th strike was number 98, and that was Kenneth L. Williams. Observations by our group in observing the jurors was that this man was once again, seemed to be involved with the juror, Mr. Gray. He seemed to be associating with him. His general appearance was very rough and simply felt like the combination of the two justified and required us to remove him from the jury panel.

Our 18th strike was number 9, Ruby Lee Brown. Now she, according to our information, had had a husband who had been killed in a homicide. That seemed to be a plus. Sheriff's Office was very concerned that she was extremely negative about that particular case and we felt that leaving her as a juror would not be wise under these circumstances. She was not happy or pleased with the situation, that we should remove (R–394) her, so we did.

Juror number 40, Mrs. Hayes, Lelia Hayes, getting to the point where some of these jurors had some pluses. We were concerned about keeping her. Mrs. Hayes worked with Mrs. Bailey at the nursing home. However, the reaction during individual voir dire concerning that, she seemed to be totally removed from that situation and totally unconcerned about it and based on that, we felt there might be some animosity or something we didn't realize with Mrs. Hayes. We struck her on that basis.

Number 43, Mrs. Hobson, was our next strike and this was a juror we had decided that we would leave on the jury or keep on the jury, but we felt that she was all right, from our standpoint. However, our information was that she was requesting to get off the jury and had requested to get off the jury. She had had an invalid husband and the storm last night essentially damaged

their house. So we went ahead and removed her for those reasons. Otherwise, we would have kept her.

Our 21st strike was number 59 — 39, Sarah Harris. The information reported was that she had kinspeople who had been in criminal trouble and though (R–395)we had otherwise felt that she was all right, that information caused us to remove her.

Juror number 106 was Mr. Wyatt, who had indicated he had been in criminal trouble and had been prosecuted at some point in time, though he was extremely positive in his individual voir dire, that information, we felt, required that he be removed.

MR. JOHNSON: He was a white male.

MR. GREENE: And juror number 38, was Mr. Michael Harris, who indicated that he had a cousin at some point in time, 15 years ago, that had been involved in some type of criminal activity and we struck him on that basis.

THE COURT: Is that all?

MR. GREENE: That concludes all our strikes. We would like to mention for the record that the defense strikes were of all white males or females, for whatever benefit that is.

THE COURT: Cross examination.

MR. MORRIS: Judge, I'm not sure that I have any cross. I would make it known for the record on I think there were three people that they mentioned and that was Mr. Williams, Mr. Pratcher and a Mr. Pratcher. Mr. Kenneth Williams and Mr. Willie Pratcher and one other individual (R–396) that I believe the District

Attorney eluded to as sitting near or being around Mr. Gray. I would make it known to the Court, I believe the Court would recall that during yesterday's continuous voir dire that lasted into the night, Mr. Gray was an occupant on the front row with a Mr. Corley sitting on one side and a Mr. Collins sitting on the other. Both of whom were white. To my knowledge, there was not another black individual on the front row yesterday. So I would differ with the information of the State in that regard.

Now the information that the District Attorney has concerning things like they had some relatives involved in some crimes, being in small claims court where they've beendidn't seem to know anything about it, we contend that the jurors by comparison that were left on this case knew nothing about it. Starting with Mr. Grinstead, Mrs. Fondren, Mr. Corey, also responded that they knew nothing about it. A Mrs. Lyles.responded that she knew something about it. She was left. A black female. Now Mrs. Marks responded that she knew (R–397) something about it, a black female. A Mr. Ryans responded that he knew something about it, a black male. A Mrs. Travis responded that she knew something about it, a black female. Mrs. Williams responded that she knew something about it, a black female, and our contention is that it's clear that the fact that someone knows nothing about it played no part and we contend that it was strictly on the basis of race in this matter.

As to Mrs. Ruby Lee Brown, she stated in voir dire that her husband was a victim of a homicide and that the victim was prosecuted and there would be no other — I

believe she also responded — I believe she had a bumper sticker — I take that back, Your Honor. That's not true. I'm saying that there would be no reason in the world that I can think of why she would not be an excellent juror other than race. She was struck.

Further, we contend that the last four strikes that they enumerated, starting with Mrs. Brown, are very vague and very indecisive answers. For instance, Mrs. Hayes, number 19 strike, number 40 on the venire list, stated that she knew Mrs. Bailey and that she knew her and knew her (R–398) daughter and had an association with Mrs. Bailey who's in the nursing home where she's employed as well as knew her daughter well. No conceivable reason that the defense can find, no conceivable reason that she would not make an excellent juror for the State, other than the fact that she's black.

Now there's vague allegations on number 43, they say that her husband had been in some sort of problem. Mrs. Hobson, we contend that's just a smoke screen there. And then one of the persons up here, he had some sunglasses on. The defense contends certainly that is no justifiable reason. Now that's all I have.

MR. GREENE: Our only response is that one of the first things as to Mr. Gray, it was reported to us and made quite some concern as to Mr. Gray this morning concerning who he might talk to. Now this is the information we got from the people we asked to try to pay attention. Now Mr. Williams, Gray, Patton and Pratcher, were sitting together this morning in the back of the courtroom. We felt that that might be a matter of concern. We point out for the record that the last, I think, five strikes, for the State involved two white males we thought we (R–399) had some problems with and three black females that we were concerned about. We

also thought these three black females might make us good jurors, but we had reason, we felt, overrode our desires to retain them.

I think that's all.

THE COURT: Is it your testimony as an officer of this Court that the reasons for striking were nonracial and not based upon the race of any particular juror?

MR. GREENE: It is, Your Honor. I think the jurors we have before us bears that out. There's black males serving, some five blacks in total. We have an abundance of females on this jury in a capital murder case. I think we've got a jury that well reflects, based upon peoples backgrounds, Your Honor, and on that basis, a fair racial mixture of males and females, black and white, in this community. We arrived at this through exhaustive and argumentative process.

At Mr. Stephens trial which began December 14, 1987, the Hon. Larry W. Morris, trial counsel for Mr. Stephens, raised an objection to the fact that of the 22 jurors struck by the State, the first 21 were black, (R–386).

During the closing arguments of the State, Mr. Ed Greene, Chief Deputy District Attorney, made an allegation to the jury that Mr. Morris was attempting to cover up all the evidence, a direct and personal attack on the character of a fellow–attorney, Mr. Morris, (R–814). Although Mr. Morris objected to this comment, the Court overruled his objection and allowed Mr. Greene to continue with his attack, (ibid).

During the penalty phase of Mr. Stephens' trial the court allowed the State of Alabama in the person of

Mr. Greene, to elicit testimony concerning a crime alleged to have been committed by Mr. Stephens in Carrollton, Georgia, although Mr. Stephens had never been convicted of the offense, (R–870, 871).

At the appellant's sentencing trial, the State's prosecutor specifically stated that there were only two aggravating circumstances that they intended for the jury to consider, (R–858). The first aggravating circumstance was the alleged event that was the basis of the trial. The second alleged aggravating circumstance had occurred 11 days before this alleged event, (R–865). The trial court specifically charged the jury that there were only two aggravating circumstances for them to consider, (R–883).

The trial jury deliberated the issue of whether life without parole or the death penalty was the appropriate penalty to impose in this case. After deliberation, the trial jury, by a seven (58%) to five (42%) vote, determined that life without parole was the appropriate sentence to be imposed in this case, (R–906). Yet, the trial court, without justifiable causes stated, refused to give any credence to any of the mitigating issues presented by the Defense counsel before the advisory jury and sentenced the appellant to death.

The appellant was convicted of capital murder on December 17, 1987, (R–183), and sentenced to death on July 24, 1989, (R–908, et seq.).

Supreme Court of Alabama
Application for Rehearing
Stephens Appeal

IN THE SUPREME COURT OF ALABAMA

No. 1900032

Ex parte Victor Stephens

In re:

VICTOR STEPHENS,	*	2 Div. 738
	*	
Appellant,	*	On Appeal from
vs.	*	Hale County Circuit Court
	*	CC–89–34
STATE OF ALABAMA	*	
	*	
Appellee,	*	

ON PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

APPLICATION FOR REHEARING AND BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

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IN THE SUPREME COURT OF ALABAMA

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STATE OF ALABAMA	*	
	*	
Appellee,	*	

APPLICATION FOR REHEARING AND BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

On March 15, 1991, this Court affirmed the conviction and death sentence of Victor Stephens. Mr. Stephens comes before this court pursuant to Rule 40 of the Alabama Rules of Appellate Procedure and seeks reconsideration of this Court's judgment denying relief from an unconstitutionally obtained conviction and death sentence in *Ex parte Stephens*, _____ So.2d _____, No. 1900032 (Ala. 1991).

Mr. Stephens contends that this Court has failed to properly recognize violations of his rights under state and federal law and incorrectly concluded that his conviction and death sentence are due to be affirmed. In support of his application for rehearing Mr. Stephens incorporates by reference his briefs filed on appeal to this Court and further submits the following.

ARGUMENT

I. THIS COURT ERRED IN CONCLUDING THAT THE PROSECUTOR'S USE OF 21 OUT OF 23 PEREMPTORY CHALLENGES AGAINST BLACK JURORS DID NOT VIOLATE *BATSON* AND ALABAMA LAW.

The prosecutor in this case used ninety–one percent (91%) of its available peremptory challenges to exclude black potential jurors from jury service at Mr. Stephens' capital trial. The exclusion of 21 black potential jurors out of 23 peremptory strikes establishes an extraordinary prima facie case of racially biased jury selection that could not be rebutted by the prosecutor's professed reasons. The prima facie evidence of racially discriminatory use of peremptory challenges was so great in this case that a prosecutor cannot simply state what would otherwise constitute racially neutral reasons and adequately rebut the showing of a constitutional violation.

This Court's deference to the reasons proffered by the prosecutor for exercising 91% of the State's peremptory challenges against black jurors violates *Batson v. Kentucky*, 476 U.S. 79 (Ala. 1987); *Ex parte Branch*, 526 So.2d 609 (Ala.

1987), and is wholly inadequate to combat invidious racial discrimination in the imposition of criminal justice.

II. THE TRIAL COURT'S STANDARDLESS AND IMPROPER OVERRIDE OF THE JURY'S VERDICT OF LIFE IMPRISONMENT WITHOUT PAROLE VIOLATES MR. STEPHENS' RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND ALABAMA LAW.

The standardless and arbitrary override of jury verdicts for life imprisonment without parole in Alabama violates state and federal constitutional protections rooted in the Sixth, Eighth and Fourteenth Amendments. The trial court's override of the jury's verdict for life imprisonment without parole in this case was particularly unconstitutional where the trial judge offered no reason for rejecting the jury's verdict for life imprisonment without parole; the facts of this case did not dictate that a judgment of death was so clear and convincing that no reasonable person could differ, and neither the Court of Criminal Appeals nor this Court made any specific review of the propriety of the trial court's override in this case or otherwise sought to limit and regulate the use of override in Alabama capital proceedings.

Of the three states which permit judge override of a jury recommendation of life, only Alabama has articulated no precise standard to guide a trial judge's consideration and override of a jury verdict of life imprisonment without parole.[1] In rejecting

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1. *See Chavez v. Indiana*, 539 N.E.2d 4 (Inc. 1989) (Expressly noting that Alabama has not yet adopted a precise standard to regulate judge overrides of

the *Tedder* standard as an "extra protection" afforded capital defendants, *Murry v. State*, 455 So.2d 53, 65 (Ala.Crim.App. 1983), appellate courts in this state have failed to recognize that a mechanism limiting discretion is integral to the constitutionality of the override.[2] *See Dobbert v. Florida*, 432 U.S. 282, 285 (1977) (terming *Tedder* standard a "crucial protection" in the Florida scheme).

Under Alabama law, before a sentence of death can be imposed on a person convicted of a capital offense, the defendant has a right to a sentencing hearing before a jury that must carefully weigh aggravating and mitigating circumstances and render a sentencing verdict which is advisory. §13A–5–46, *Code of Alabama*, 1975. The jury plays a critical role in imposition of the death penalty in Alabama. Alabama law has required that any error undermining the reliability of the jury's critical sentencing determination must result in a new sentencing proceeding.

In upholding Florida's override provision in *Spaziano*, the United States Supreme Court expressly relied on Florida's standards which guide a trial court's decision to override a jury recommendation of life.[3] *See Tedder v. State*, 322 So.2d 908 (Fla. 1975). This Court has adopted no guidelines and as a

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jury sentencing verdicts in capital cases). *See Infra.*

2. Some Alabama judges and commentators have expressed a desire for Alabama to adopt a *Tedder* standard and provide guidance to judge override. *See e.g., Ex parte: Arthur Jones*, 456 So.2d 380, 382 (1984) (J. Jones concurring); Colquitt, "The Death Penalty Laws of Alabama" 33 Ala.L.Rev. 213, 326–328 (1982).

3. In Florida a trial court may override a jury recommendation of life only if "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ." *Proffitt*, 428 U.S. 242, 249, *quoting Tedder v. State*, 322 So.2d 908 (Fla. 1975).

result jury verdicts for life are rejected arbitrarily and without adequate constraints. Some trial judges consider jury verdicts for life to be mitigating circumstances, some like Mr. Stephens' judge do not. This court has previously stated that additional appellate review takes place in override cases, *Ex parte Tarver*, _____ So.2d _____ (Ala. 1989), yet neither this Court nor the Court of Criminal Appeals specifically reviewed whether the judge's override was justified.

The arbitrary and standardless application of the death penalty after sentencing juries have carefully concluded that death is not the appropriate punishment should be reconsidered by this Court.

III. THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF FELONY-MURDER IN VIOLATION OF STATE AND FEDERAL LAW.

At Victor Stephens' trial, the court only instructed the jury on intentional murder during the course of a robbery and on intentional murder. The trial court should also have instructed the jury on the lesser included offense of felony–murder. The State introduced overwhelming evidence of a robbery and substantial evidence that the killings were the unintended consequence of one of the victims drawing and firing a shotgun. In fact, the evidence of an unintentional killing was so strong that the court actually instructed the jury on the affirmative defense of self–defense. Given the evidence of robbery, the court's failure to instruct on felony–murder left the jury with only two options: either to convict the defendant of capital murder or to acquit the defendant. This deprived Mr. Stephens of his due process rights guaranteed under *Beck v. Alabama*, 447 U.S. 625 (1980), and applicable state law.

The law in Alabama is well settled that "the jury must be permitted to consider a verdict of guilt of a noncapital offense 'in every case' in which 'the evidence would have supported such a verdict." *Hopper v. Evans*, 456 U.S. 605, 610 (1982).

The cases following *Beck v. Alabama*, 447 U.S. 625 (1980), have made it clear that the standard to determine when a lesser included instruction should be given is whether "there is any reasonable theory from the evidence which would support the [lesser offense] position." *Fulghum v. State*, 277 So.2d 886, 890 (1973); *Cook v. State*, 431 So.2d 1322, 1324 (Ala. 1983) (*quoting Hopper v. Evans*, 456 U.S. at 611–612); *Richardson v. Johnson*, 864 F.2d 1536, 1538 n.3 (11th Cir. 1989).

Under the *Fulghum* standard, an accused is entitled to a lesser included instruction regardless of whether the State or the defendant offers the evidence supporting the lesser included offense. *Ex Parte Pruitt*, 457 So.2d 456, 457 (Ala. 1984). In addition, if "the defendant denies the charge but the evidence presented by the State suggests a reasonable theory supporting a charge on a lesser offense, the trial court is obliged to give a charge on the lesser offense when requested." *Id.*

In the case at bar, the State presented to the jury three statements of the defendant. In the first statement, given on January 23, 1986, Mr. Stephens stated that it was the co–defendant's idea to rob the store, that he did not know who had shot first, his co–defendant or the store–owner, but that when he entered the store "he was shot by one of the men in the store with a shotgun." R–619. He also related that he was high on cocaine and LSD prior to the robbery and therefore could not remember all of the details. R–619. In the second statement, which was given on January 25, 1986, and read to the jury, Mr. Stephens stated:

> I just walked into the store after Peabody [the co-defendant] went in. He had been in a while so I went in to see what was happening. When I walked in, the white man started shooting with a shotgun. I just pulled out my pistol and started shooting. We left and came back to Georgia.

R–626–27. And in the third statement, given on January 28, 1986, and also read to the jury, Mr. Stephens explained:

> After we came across a long bridge in Alabama, Peabody kept saying, 'he needed some money.' After we crossed the bridge, we pulled over to this store to get gas. Peabody said 'he needed some money.' I told him I had enough money to get us home.
>
> When we pulled up to the gas pump a white man came out and pumped us $10 worth of gas. I asked the man if he had a bathroom and he said 'no.' I got back in the truck and smoked a cigarette. Peabody went into the store. He stayed [in] the store a long time and I walked up to the store and opened the door, then this white man shot me in the hand. I fell to my knees and pulled my gun (.25 cal. automatic) out of my right rear pocket and started shoting. I don't even know if I shot anybody or not. The white man was standing to my left when he shot me with the shotgun. Peabody came running by me yelling 'let's go, let's go.' We ran out and jumped in the truck. I didn't make it in time.

R–669–670.

Clearly, this evidence supported a theory of felony–murder and the trial court recognized as much. The court notified the parties that it would instruct the jury on capital murder and on the lesser included offense of felony–murder. R–776–77; R–781. However, the court ultimately decided not to instruct on

felony–murder because the State convinced the court that there is no difference between intentional murder during a robbery and felony–murder. R–782 ("[t]hey don't have to come in with intent to kill them and rob them").[4] The court's failure to charge on felony–murder denied Mr. Stephens his right to due process and to be free from cruel and unusual punishment in violation of state and federal law.

IV. THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY ON REASONABLE DOUBT IN VIOLATION OF VICTOR STEPHENS' RIGHT TO DUE PROCESS.

At Victor Stephens' trial, the court's instruction on reasonable doubt would have allowed the jury to find the defendant guilty on a degree of proof below that required by the Due Process Clause of the Alabama and United States Constitutions.

Most recently, the United States Supreme Court summarily reversed a conviction where the trial court had improperly instructed the jury on the element of reasonable doubt. *Cage v. Louisiana*, _____ U.S. _____, 59 U.S.L.W. 3361 (November 13, 1990). The instruction under review in *Cage* provided:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence

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4. The State's position, of course, is clearly erroneous. *See Russaw v. State*, 572 So.2d 1288 (Ala.Crim.App. 1990).

> demonstrated a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.

Id. The Supreme Court concluded that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by due process. The Court wrote:

> It is plain to us that the word "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it become clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Id.

At Victor Stephens' trial, the court used the words that the Supreme Court held are commonly understood to denote a higher degree of doubt. The court stated that "the doubt which would justify an acquittal must be *an actual and substantial doubt*. . ." R–832 (emphasis added). The court told the jury that it need only have "an abiding conviction of the truth of the

charge." R–832. In addition, the court, at several points, equated beyond a reasonable doubt with "to a moral certainty." R–833. The result was that the jury should have found defendant guilty on a degree of proof below that required by due process.

V. THE STATE PROSECUTOR ENGAGED IN IMPROPER ARGUMENT IN VIOLATION OF MR. STEPHENS' STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

The prosecutor at Victor Stephens' trial made an improper reference to the substance of the co–defendant's statement, in direct violation *Bruton v. United States*, 391 U.S. 123 (1968), and also improperly shifted the burden of proof, in violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979). In addition, the prosecutor repeatedly made impermissible references to the victim and the victim's family, in violation of *Booth v. Maryland*, 482 U.S. 496 (1987).[5]

A. *The Bruton Violation.*

During closing argument, the state prosecutor remarked:

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5. *See, e.g.*, R–788 ("on behalf of the State of Alabama and Mr. Pickens and Mr. Bailey and the relatives, we appreciate [your attention] very much"); R–819. The state also engaged in the impermissible practice of sitting the victim's family at the prosecutor's table. *See* R–417.

> Now in the course of this trial, there was some evidence about an eyewitness and there was a comment from the witness stand concerning the fact, that wait a minute, there's another eyewitness. You can only speculate as to what he had to say. You're not going to know anything about what he said or didn't say. Now this man's co–defendant is not saying, "Oh, yeah, it was mu idea, I'm the guilty one." You can bet your bottom dollar he's pointing the finger at him saying, "no, he lead us into it." So what is this statement? It is that, "I was there, I was involved with it," and he's covering up what he really did and that is that both of those men went in there to rob and do whatever was needed to get money from those two old men. . .

R–818–819.

The State's use of the co–defendant's statement denied Mr. Stephens the right of cross–examination secured by the Confrontation Clause of the Sixth Amendment. *Bruton v. United States*, 391 U.S. 123 (1968); *Douglas v. Alabama*, 380 U.S. 415 (1965); *Gladden v. State*, 551 So.2d 1141 (Ala.Crim.App.), *cert. denied* (1989) (reversing on the basis of *Bruton*).[6] The highly prejudicial nature of the prosecutor's statement, namely that the co–defendant pointed the finger at Mr. Stephens, requires reversal in this case.[7]

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6. The interlocking confession exception carved out in *Parker v. Randloph*, 442 U.S. 62 (1979) does not apply here since the trial court gave no limiting instructions.

7. Earlier, the trial court specifically precluded the state prosecutor from questioning an investigative officer on the co–defendant's statement, exclaiming "I can't do that. I cannot do that. I can't let Starks' out–of–court statement — I just can't do that. I think that's rank hearsay in one respect." R–651.

b. *The Improper Burden Shifting Remarks, Comment on Silence and Penalization for Exercising the Right to Counsel.*

During closing argument, the prosecutor also remarked:

> He got up in his closing argument, and keeps trying to talk about holes somewhere. Yet he never proved a single piece of evidence about anything connecting with that. He's supposed to give you some idea, and you're supposed to believe that somewhere they had this man down in a hole beating on him with sticks to make him confess. That's what you're supposed to believe. But he hasn't proved anything like that. . . . He hasn't proved anything like that because it doesn't exist. . . . He hasn't proved any of it. I get awfully tired of coming up here listening to that kind of defense. Where is his defense in this case? What is he defending this man on?

R–814–815.[8]

These remarks improperly shifted the burden of proof in general, and, in particular, the burden of proving the involuntariness of a statement, in violation of Mr. Stephens right to due process. *Sandstrom v. Montana*, 442 U.S. 510 (1979) (holding that an instruction concerning a presumption of intent violates due process); *Lowery v. State*, 108 So.2d 351 (Ala.Crim.App. 1926) (remark that "[h]e had his friends here, but he did not

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8. Counsel objected to this line of argument, claiming that it improperly shifted the burden of proof and penalized the defendant for asserting his right to counsel. R–815.

put them on the stand" held to be reversible error). The remark also amounted to an indirect comment on the defendant's failure to take the stand and testify, in violation of his Fifth Amendment privilege against self–incrimination. *Ex parte Williams*, 461 So.2d 852 (Ala. 1984); *Ex parte Brooks*, 562 So.2d 604 (Ala. 1990); *Arthur v. State*, Slip Op. at 44 (Ala.Crim.App. 1990). Finally, the state prosecutor penalized the defendant for exercising his right to counsel, in violation of Mr. Stephens' right to a fair trial.[9] *Cunningham v. Zant*, No. 90–8165 (11th Cir. 1991) (improper appeal to the passions and prejudice of the jury and derogation of defendant's right to fair trial highly improper); *United States v. McDonald* 620 F.2d 559 (5th Cir. 1980).

VI. THE TRIAL COURT IMPROPERLY RELIED ON A SUBSEQUENT CONVICTION TO OVERRIDE THE JURY'S VERDICT OF LIFE IN VIOLATION OF MR. STEPHEN'S STATE AND FEDERAL DUE PROCESS RIGHTS.

Mr. Stephens was convicted of first degree robbery and attempted murder on October 20, 1987, in Randolph County, Alabama, and sentenced to life without parole. This conviction was obtained nine months after Mr. Stephens allegedly participated in the events leading to this case (January 20, 1986). Nevertheless, the trial court used the Randolph County conviction as an aggravating factor and held that "the Defendant was previously convicted of a felony involving the use or threat of

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9. *See also* R–824 ("He's got not right to sit over there and claim there's something wrong with this case.")

violence to the person." *Sentencing Order*, July 24, 1989, p. 7 (Volume I, p. 171).

Under the Alabama capital sentencing statute, it is an aggravating circumstance that "[t]he defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person." Ala. Code § 13a–5–49. The plain meaning of this provision is clear from the language employed: the defendant must have been convicted of another violent crime prior to committing the capital offense charged. In the context of the seven other aggravating circumstances, it is also clear that the defendant must have been convicted of a violent crime at the time he commits the capital offense charged. Finally, the purpose of the aggravating circumstance — namely, to deter repeat violent offenders — is only served if the defendant was previously convicted and punished for the previous violent crime.

Accordingly, the trial court's reliance on a subsequent conviction to override the jury's verdict of life deprived Mr. Stephens of his rights to due process and to be free from cruel and unusual punishment, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and of Article I of the Alabama Constitution.

VII. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING INTO EVIDENCE STATEMENTS OBTAINED IN VIOLATION OF MR. STEPHENS' FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION.

The trial court improperly admitted into evidence four statements of the defendant in violation of the Fifth, Sixth,

Eighth and Fourteenth Amendments. In the first statement, the defendant denied any participation in the crime and stated that he had been shot by Dennis Jones in Carollton, Georgia. R–636. The interview was given in a hospital in Carollton, Georgia. The State, however, never established that Mr. Stephens had knowingly and intelligently waived his *Miranda* rights at that first interview.[10] R–39 (no evidence that defendant waived his rights); R–28 (*Miranda* waiver only signed at third interview of January 25, 1986); R–57 (no evidence that defendant waived his rights); R–58 (same). As a result, the first statement was inadmissible for lack of a valid waiver and the three other statements were inadmissible as fruits of a poisonous tree. *Brewer v. Williams*, 430 U.S. 387, 404 (1977) (State has burden of establishing a valid waiver); *Michigan v. Long*, 475 U.S. 625, 633 (1986) (same).

In addition, Mr. Stephens asserted his Fifth amendment rights on January 23, 1986, at the conclusion of his second statement. R–40 (defendant said "I don't want to talk about killing them two men anymore"); R–620 (same). Nevertheless, the State initiated two subsequent interviews. *See* R–46 (January 25, 1986) ("I believe I would think I called and asked the defendant to be brought forward to be interviewed); R–50–51 (January 28, 1986). The State failed to honor Mr. Stephens' assertion of his Fifth Amendment rights by initiating subsequent interviews, in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981). *See also Michigan v. Jackson*, 475 U.S. 625 (1986) (*Edwards* established another prophylactic rule designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights); *Minick v. Mississippi*, No. 89–6332, Slip Op. at 4 (December 3, 1990)

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10. Mr. Stephens was additionally in no condition to intelligently waive his right to counsel given his physical and mental condition at the hospital, his drug addiction and limited intellectual functioning.

(same). As a result, any subsequent waiver of the defendant's Fifth Amendment rights is invalid. *See Arizona v. Roberson*, 486 U.S. 675, 680–681(1988). The admission into evidence of the third and fourth statements, *see* R–627 and R–670, therefore violated Mr. Stephens Fifth, Eighth and Fourteenth Amendment rights.

CONCLUSION

Mr. Stephens' application for rehearing should be granted and his unconstitutionally obtain conviction and sentence of death overturned.

Respectfully submitted,

Blanchard L. McLeod, Jr.
622 Alabama Avenue
Selma, Alabama 36702

Counsel for Victor Stephens

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached document has been served on counsel for the State of Alabama, Hon. Beth Slate Poe, Office of the Attorney General, 11 South Union Street, Montgomery, Alabama 36130, this 29th day of March, 1991.

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Blanchard L. McLeod, Jr.

Circuit Court of Hale County, Alabama

Closing Argument of Defense Counsel

Stephens Trial

Record 800–808

MR. MORRIS: If it please the Court, ladies and gentlemen of the jury, this is the last time I'll have an opportunity to speak to you and I'm quite confident that a lot of you are about ready for me to be quiet. I understand that. I walked into this courtroom for the first time in my life Monday. I saw a group of jurors who are faced with a mighty touch task and I know that. But a group of jurors who's not shurking their task.

The State is going to talk to you about confessions and I'm going to talk you about confessions. Now during the time that I'm talking with you, I hope I've — I have a tendency, and my wife says I have a tendency when I get excited, I get up a little louder. Now let me hasten to say that during the course of this trial if I've done something or not done something that you didn't approve of, I want you to tell me afterwards. Hold it against me, don't hold it against the individual that's been seated over there with me during this week. I want to talk to you basically about some things that he talked to you about in opening statements. Now ladies and gentlemen, one of the things that I've found that is if you'll be truthful with the jury, the jury will appreciate it. I told you that I didn't know whether or not Victor Stephens did these acts, and let me tell you again that I don't know. I believe you don't know either. Let me tell you about four things or the four reasons why I don't know. Let's start off with something right here.

If you'll recall that they found a pair of gloves when they searched the vehicle and if you will recall, the gloves, they didn't introduce them in evidence, but there was no shot mentioned of any — wasn't any shot in the gloves, either hand. So let's assume that that would lead you to believe that the reason, because of this smooth surface here, there are no fingerprints, that there are no Victor Stephens' fingerprints is because he had the gloves on, and that is not true. There wasn't any shot in the gloves. Of course, if he had the gloves on, he would have shot holes in the gloves and that wasn't true. Everybody agrees with

that. It's inconceivable that within 30 minutes, when a man is gripping, whoever it was, was gripping this weapon, if you believe Mr. Lawden Yates, the toxicologiest was gripping it here and here and here, that you wouldn't have the man's fingerprints on there, well, you did have the man's fingers on there. Don't be misled by that. The interesting thing is that they didn't have Victor Stephens' fingerprints on there because, as I said, did they compare the prints that they extracted from the handle of this gun with Victor Stephens? Yes. Did it match? No. That's the evidence before you. That's the State of Alabama's witness. How many people have got type B blood? Mr. Serologist, Mr. Forensic Scientist with the State of Alabama, with all its resources, 250,000 people, you can't convict on that. Tell me, Mr. Firearms Expert, and Mr. Ballistics Expert, tell me did that shot in Victor Stephens' hand come from that shotgun? I don't know. And they know, ladies and gentlemen. These are experts, supposedly. They knew they couldn't take the hand — the shot in the hand and match it up with this. They couldn't match the fingerprints and there's one other thing that ain't nobody mentioned and I want the man who's got the last shot to tell you about this too. If he can't, he can't. Why, Mr. Forensic Scientist, didn't you take that hat that he said from this witness stand that had hair in it and why didn't you take that one thing, you hadn't got the fingerprints? We dusted the cash register and we dusted the door and we dusted here and we dusted there and found the prints down here on this gun, but we've got a hat. Now I'm nervous, I have never done this before. I've never had a man's life in may hands before. I want them to tell you. Either that they took those — they knew to do that. They had that hat, standing right by the door, he said. Right next to the .25 caliber that had somebody else's fingerprints on it and then they took that hat in their possession. I submit to you of those two things, I don't know the answer. Hair is the easiest to match up. It's the easiest way to convince you, to bring evidence to you, to convince you beyond a reasonable doubt and to a moral certainty. Hair is unique. He

talked about the bore in this weapon. I submit to you that he said there is some that he just can't distinguish. Some he can't detect because it's microscopically hard to determine. I submit to you that your hair and my hair will match up if it's in another place every time and it's the easiest to do. Now, Mr. State of Alabama, if you want to make a case, and I say to you again, I don't know. But that's the one means available to them to let you know, and I don't know why they didn't match it, I'll never know that. I will not have an opportunity to do all of this. The State of Alabama has got all of those resources —

MR. GREENE: I object to that argument. This evidence is equal to both sides.

MR. MORRIS: It is not. The first I heard about it was on the witness stand.

THE COURT: Address your remarks to the Court.

MR. GREENE: Yes, sir; I'll address them to the Court.

MR. MORRIS: The first time I ever heard about that was right there on that witness stand. I filed the proper motions.

THE COURT: It's argument of counsel. Ladies and gentlemen, this is argument of counsel. I've instructed you earlier that this is not evidence and I'll instruct you further as to this as we go further. Continue.

MR. MORRIS: So then what we've got here, ladies and gentlemen, is the State is saying that you should invoke the death penalty. That's what they're asking for. You can cut it any way you want to, but that's what is before you, and will be before you. They're asking you to do that. They're asking you

to do that when they haven't got this fingerprint. When they can't identify by blood, when they can't identify by the shot and the one thing they they know that they can identify by is that hat and they never mentioned that. They don't bring that to you, yet they say convict.

Well, why do you convict? Oh, because he gave a statement. He gave a statement. I'll ask you to do this. I know you all will do it. When you get back in the jury room, I'd ask you to deliberate or think about two things. Think about the evidence without the statement. Think about the witness that says a man that robbed me, didn't say one or two. Now I told you in opening statements that he would say that there were two men. That was incorrect. I was incorrect on that. I apologize. But that's the way I understood it. I hadn't talked to Mr. Portis then at that time. But, "the man or men that robbed me were white. They were driving a red car." Now I suppose they're going to say to you, oh, don't beleive him, he was delirious. What if he was right? What if he was right? What if the man who saw it with his own eyes and then dismissed Mr. Portis and even Mr. Jim over here with the District Attorney's Office got before you and said we know Mr. Portis, he was telling the truth. Nobody doubts that Mr. Jessie Portis who came up here, that that was old to him. Nobody is doubing that Mr. Jessie Portis is telling the story. So if Mr. Jessie Portis isn't telling a story, I guess they're saying Adam Pickens is telling a story. I guess that's what they're saying. I don't know. They're going to get the last shot at you. Then we go to what they call the confessions. If I understood it correctly, it took four times to get it the way they wanted it. They go to the hospital the first time and I may be wrong about my dates, but I thought it was on the 21st. They say it's on the 20th. I thought Mr. Stone said he went on the night of the 21st which would have been on Tuesday. Y'all heard the evidence. He said he was shot in the hand by his girl friend's dad and that's what he said. That's what Mr. Stone said that he said. Then he placed him under

arrest and then two days later when he's in the jail, in the "hole" down there, they bring him up and then he gives an oral statement. It's an oral statement, not signed by Victor Stephens. He acknowledges it's not signed. I think he said it lasted two hours. Then he goes on. That's on a Wednesday and then on Saturday he goes back to the "hole", he goes back to the "hole" and for whatever reason on the following Saturday he brings him back. I believe they said at that time there were five officers present. Then he talks to them, as I understood it, for three hours. That's five hours longer than you have been here today. And then on the 28th which would have been on a Tuesday, he talked to the officers for four and a half hours, and that totals up to nine and a half hours.

I submit to you, ladies and gentlemen, and I'm going to sit down shortly, I submit to you the reason why they brought this person up there and ever what means were made to illicit a statement was that they knew they had no case without it. I further submit to you that many a person is in the penal system of the State of Alabama where a statement had been forced and forced and forced out of them with no validity or truthfulness. I have a heavy duty. I understand that duty. The burden has been on my shoulders. I'm passing it now to you. The judge is about to charge you that unless you're convinced beyond a reasonable doubt, you can't convict. It's not on the defendant to prove to you his innocence it's on the State of Alabama and I have never seen as many law enforcement officers out there or experts or forensic science people in my life sitting out there at one time. Why they did not tell you and match for you what was readily available at their disposal, only you can answer because you've got to guess. You've got to surmise and you've got to speculate. Under the law, you can't base a verdict on that. I'm confident when the State of Alabama proves their case to you beyond a reasonable doubt that you will convict. You should. But when the State of Alabama comes up here to

you and is looking for some scapegoat without sufficient evidence, you have just an equal obligation under the law and under our system that has worked for 200 years, to do the tough, to do the difficult, and when they fail to prove it to you, as they have failed in this case, you have just a greater duty to the defendant. Thank you.

Circuit Court of Hale County, Alabama

Judge's Instructions to Jury

Stephens Trial

Record 825–849

THE COURT: Ladies and gentlemen, at this point in the trial, it's my duty to instruct you as to the law applicable to this particular case. The Defendant in this case is charged, first in Count I of the indictment, with the offense of murder during robbery in violation of Section 13A–5–40(a)(2) of the Alabama Criminal Code. This offense is classified under the code as a capital offense. I'll read to you that portion of the indictment that relates to Count I. It states,

"State of Alabama,

Hale County,

March 24, Session, 1986

The Grand Jury of said County charge that before the finding of this indictment Victor R. Stephens, whose name is otherwise unknown to the Grand Jury other than as stated, did intentionally cause the death of Adam Pickens by shooting him with a pistol and Victor R. Stephens caused said death during the time that Victor R. Stephens was in the course of committing a theft of lawful money of the United States, a description of same being otherwise unknown to the Grand Jury, the property of James R. Bailey, doing business as J.R. Bailey Grocery Store, by the use of force against the person of Adam Pickens, or against the person of another present, to–wit: James R. Bailey, with intent to overcome his physical resistance or physical power of resistance, while the said Victor R. Stephens was armed with a deadly weapon, to–wit: a pistol, in violation of the *Code of Alabama*, 1975, Title 13A–5–40(a)(2),

against the peace and dignity of the State of Alabama."

The Defendant in this case is charged in Count II of the indictment with the offense of murder during robbery in violation of Section 13A–5–40(a)(2) of the criminal code and this offense also is classified as a capital offense. This count of the indictment reads as follows:

"State of Alabama,

Hale County,

March 24, Session, 1986

The Grand Jury of said County charge that before the finding of this indictment Victor R. Stephens, whose name is otherwise unknown to the Grand Jury other than as stated, did intentionally cause the death of James R. Bailey, by shooting him with a pistol and Victor R. Stephens caused said death during the time that Victor R. Stephens was in the course of committing a theft of lawful money of the United States, a description of same being otherwise unknown to the Grand Jury, the property of James R. Bailey, doing business as J.R. Bailey Grocery Store, by the use of force against the person of James R. Bailey, or against the person of another present, to–wit: Adam Pickens, with intent to overcome his physical resistance or physical power of resistance, while the said Victor R. Stephens was armed with a deadly weapon, to–wit: a pistol, in "violation of the *Code of Alabama*, 1975, Title 13A–5–40(a)(2), against the peace and dignity of the State of Alabama."

Signed, "Roy L. Johnson, District Attorney of 4th Circuit."

Now embraced within the offense of capital murder, as charged in both counts of this indictment, that is, Count I, as it relates to Mr. Pickens and Count II, as it relates to Mr. Bailey, is the lesser included offense of murder in violation of Section 13A–6–2 of the Alabama Criminal Code which is a class A felony. Now the Defendant in this case is charged in each count of the indictment with having committed a capital offense. A capital offense is an offense for which the punishment is either life imprisonment without parole or death. The law provides that if a defendant is convicted of a capital offense, additional proceedings will be held to determine whether his punishment is to be life imprisonment without parole or death. But you are not to concern yourselves at this time with any issue of punishment. Instead, the only determination you are to make at this time is whether the State has proven beyond a reasonable doubt that the Defendant is guilty of a capital offense as to Counts I and II or as to either count or of some lesser offense which I'll instruct you about later.

Now as to each charge against him of capital offense of murder during robbery as charged in Count I of the indictment and the capital offense of murder during robbery of Mr. Bailey as charged in Count II of the indictment and to the lesser included offenses of murder which are embraced within each count of the indictment, this Defendant has entered a plea of not guilty and not guilty by reason of self–defense. Now under the

doctrine of self–defense, a person may use deadly physical force in defending himself or a third person under these circumstances if he reasonably believes that such a person is using or about to use unlawful deadly physical force or committing or about to commit an assault in the first or second degree. As person is not, however, justified in using deadly physical force upon another person if it reasonably appears or if he knows that he can avoid the necessity of using such force with complete safety by retreating.

Additionally, a person is not justified in using physical force upon another person even under the circumstances if, one, he provokes such other person to the use of unlawful physical force with intent thereby to cause physical injury or death to another person, or, two, he was the initial aggressor except that his use of force upon another person under the circumstances is justifiable and if he withdraws from the encounter and effectively communicates to the other person his intent to do so, but the other person, nevertheless, continues or threatens the use of unlawful physical force. Now my duty in this charge is to try to define for you and direct your attention to the legal principals which govern this case. I must try to state the law to you plainly and accurately so you will comprehend the principals involved. The judge's duty in this case is to decide the law and it's your duty to determine the facts. I want you to understand that I have no opinion of the facts of this case. It's not my business to have an opinion. If I did have an opinion as to this case, it would be highly improper for me to intimate or suggest it to you. So I have no opinion of the facts of this case. I

don't want you to think from anything I have said or any ruling I have made in determining the law that I think one way or the other about the facts of this case. The determination of the facts does not come within my province. That is your sole and exclusive province, for you are the judges of the evidence in this case. It is of the highest importance in the administration of justice that we keep our two provinces separate. So bear in mind, ladies and gentlemen, that the weight and sufficiency of the evidence in this case is for you and not for the Court. When a defendant is placed on trial charged with the commission of a public offense, the law says that he's presumed to be innocent of the offense. This Defendant enters this trial with the presumption of innocence in his favor and it is a fact which is to be considered by you as evidence and should not be disregarded. This presumption of innocence remains with the Defendant during the trial until overthrown by evidence which convinces you, the jury, of the Defendant's guilt beyond a reasonable doubt. Now in this case, the burden of proving that the Defendant is guilty as charged rests upon the State and before a conviction can be had, the State must satisfy you of the Defendant's guilt. Unless the State so satisfies you of the Defendant's guilt beyond a reasonable doubt and to a moral certainty, then he's entitled to an acquittal.

Now the phrase "reasonable doubt" is for the most part self–explanatory and efforts to define it don't always clarify the term, but it may help you some to say that the doubt which would justify an acquittal must be an actual and substantial doubt

and not a mere possible doubt. A reasonable doubt is not a mere guess or surmise, it's not a forced or captious doubt. If, after considering all the evidence in this case you have an abiding conviction of the truth of the charge, then you are convinced beyond a reasonable doubt and it would be your duty to convict the Defendant.

Now the reasonable doubt which entitles an accused to an acquittal is not some mere fanciful, vague, conjectural or speculative doubt but a reasonably substantial doubt arising from the evidence and remaining after careful consideration of the testimony such as reasonable fair–minded and consciencious men and women would entertain under all the circumstances. Now you will observe the State is not required to prove the Defendant's guilt beyond all doubt. Few things in life are provable beyond all doubt, but simply beyond a reasonable doubt and to a moral certainty.

If, after comparing and considering all the evidence in this case, your minds are left in such a condition that you cannot say that you have an abiding conviction to a moral certainty of the Defendant's guilt, then you are not convinced beyond a reasonable doubt and the Defendant would be entitled to an acquittal. Now I read to you the indictment in this case. The indictment in this case is no evidence at all against this Defendant. It is merely the formal method under our constitution by which a defendant is accused of a crime and placed on trial. It provides no proof, no presumption, no inference that this Defendant is guilty of the offense charged therein.

In determining what the true facts are in this case, you are limited to the evidence that has been presented to you from the witness stand as opposed to the matters which have been stated by the lawyers in the course of the trial of this case. What the lawyers have said, both for the State and for the Defendant, is not evidence. What they have argued to you at various points in the trial is not evidence. They have a right, in fact, a duty at the appropriate time during the trial to comment on the evidence and draw reasonable inferences from the evidence as they argue their respective positions to you. But what they say is not evidence and you should put what they say in a proper category in you thinking and it should not be in the evidence category, just as the indictment in this case should not be in the evidence category.

If you are convinced beyond a reasonable doubt that the Defendant committed the crime of murder of the intentional killing type during a robbery in the first degree as alleged in both counts or in either count of the indictment, then it would be your duty to find the Defendant guilty of the capital offense.

Now the two components of the capital offense are robbery in the first degree and murder of the intentional killing type committed during robbery in the first degree.

The Defendant commits the crime of robbery in the first degree if he uses or threatens the use of force against the owner of personal property or any person present while in the course of — personal property with the intent to overcome his

physical power of resistance in order to compel his acquiescence in the taking of the personal property and in the course of said theft or in the attempt thereof, either, one, intentionally causes serious physical injury or death to a person or, two, is armed with a deadly weapon or dangerous instrument.

Now the words "in the course of committing a theft," means acts which occur in the attempt to commit or in the commission of theft or in the immediate flight after the attempt or commission. A person commits the crime of theft of property if he knowingly obtains or exerts unauthorized control over the property of another with intent to deprive the owner of his property. An attempt occurs when a person with intent to commit a specific offense, does any overt act towards the commission of the offense.

The statute uses the words "deadly weapon." A deadly weapon is a firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious physical injury and that term includes, but is not limited to, a pistol, rifle or shotgun. Serious physical injury is physical injury which creates substantial risk of death or which causes serious and protracted disfigurement of health or protracted loss of function of any body organ. If, in this case you are convinced beyond a reasonable doubt that the Defendant committed the crime of robbery in the first degree as previously defined of Mr. James R. Bailey, then the first component of the capital offense as charged in the indictment would have been proven. Now, a defendant commits the crime of murder of the

intentional killing type if, with intent to cause the death of another person, he causes the death of that person or another person. A person acts intentionally with respect to a result or to conduct when his purpose is to cause that result or to engage in that conduct. The defendant must intentionally, as opposed to negligently, accidently, or recklessly cause the death of the deceased in order to invoke the capital statute. That applies both as to Count I, Mr. Pickens, and as to Count II, Mr. Bailey. The fact that someone dies or is killed during the course of a robbery, does not automatically provide that intent. The intent to kill must be real and specific in order to invoke the capital statute. To be a capital offense, the murder of the intentional killing type must have been committed during robbery in the first degree. During means in the course of or in connection with or in immediate flight therefrom. In this case, if you're convinced beyond a reasonable doubt that the Defendant committed the crime of robbery in the first degree as previously defined, and during the course of the robbery, committed the murder of the intentional killing type of Adam Pickens as to Count I, or/and of J.R. Bailey, as to Count II, or either of them, by the means alleged in the indictment, then the second component of the capital offense as charged in the indictment would have been proven. Therefore, if you're convinced by the evidence beyond a reasonable doubt that the Defendant committed the crime of murder of the intentional killing type as to Adam Pickens in Count I and as to J.R. Bailey in Count II or either or them by the means alleged in the indictment during a robbery in the first degree, then it would be your duty to find the Defendant

guilty of the capital offense charged in both counts or either of them as charged in the indictment.

On the other hand, if you're not convinced by the evidence beyond a reasonable doubt that the Defendant committed the crime of murder of the intentional killing type of Adam Pickens as to Count I and J.R. Bailey as to Count II or either of them by the means alleged in the indictment or if you are not convinced by the evidence beyond a reasonable doubt that said murder of the intentional killing type was committed during a robbery in the first degree as previously defined, committed by the Defendant, then the Defendant cannot be convicted of the capital offense charged in the indictment. Now as I previously instructed you, embraced within the charge of each count of the indictment is the lesser included offense of murder. A person commits the crime of murder if, one, he causes the death of another person, and in performing the act or acts which caused the death of the person he intended to kill that person or another person.

Now, as to Count I, to sustain the charge of murder in this case, the State, by the evidence, must prove beyond a reasonable doubt the following elements of the offense: one, that Adam Pickens is dead. Two, that the Defendant, Victor R. Stephens, caused the death of Adam Pickens. That is, that he died as a result of being shot by the Defendant. Third, that in committing the acts which caused the death of Adam Pickens, the Defendant acted with intent, and, four, that in doing the act which caused the death of Adam Pickens, the Defendant, Victor Stephens, was not

justified in using whatever physical force upon another person he reasonably believed was necessary in order to defend himself or a third person from what he reasonably believed at the time to be the use of imminent use of unlawful physical force by that other person.

Now, as to Count II, to sustain the charge of murder in this case, the State, by the evidence, must prove beyond a reasonable doubt, the following elements of the offense: One, that J.R. Bailey is dead. Two, that the Defendant, Victor Stephens, caused the death of J.R. Bailey, that is, that he died as a result of being shot by the Defendant. Three, that in committing the act which caused the death of J.R. Bailey, the Defendant acted with intent and, four, that in doing the act which caused the death of J.R. Bailey, the Defendant was not justified in using whatever physical force upon another person he reasonably believed was necessary in order to defend himself or a third person from what he reasonably believed at the time to be the use or imminent use of unlawful physical force by that other person. "With intent" means that it was the Defendant's purpose to cause the death of another person.

Now, ladies and gentlemen, expert witness have testified in this case and they've been permitted to express opinions or draw conclusions. In passing upon the facts, you are not required to accept conclusions or opinions of expert witnesses, but must determine for yourselves the weight to be given such testimony and evidence when considered in connection with all the other evidence material to

this issue. These witnesses have testified and expressed opinions based upon assumed facts, some of which were set forth perhaps in a hypothetical question. The weight to be accorded the testimony is dependent upon the truth of facts stated in the hypothetical question or questions and before considering the opinions, you should first examine carefully the material facts stated in the hypothetical questions and be reasonably satisfied that they have been substantially proven to be true.

Now what is an expert? Simply stated, an expert is one or an expert is one who, by education, training and/or experience has attained such skill, knowledge, or experience in some science, profession, business or occupation not of common knowledge to the average layman. Certainly, witnesses have testified and have been permitted to express opinions or draw conclusions. In passing upon these facts, you are not required to accept these conclusions or opinions of these witnesses, but must determine for yourselves, the weight to be accorded such testimony and evidence when considered in connection with all other evidence material to this issue. Some of the evidence in this case, of course, has been circumstantial evidence. The test of the sufficiency of circumstantial evidence is whether the circumstances as proved produced a moral conviction to the exclusion of all reasonable doubt of the guilt of this Defendant. That is, whether they are incapable of explanation upon any reasonable hypothesis consistent with the Defendant's innocence. There should not be a conviction upon circumstantial evidence unless, to a moral certainty, it excludes every other

reasonable hypothesis than that of the guilt of this accused. No matter how strong may be the circumstances, if they can be reconciled with the theory that the Defendant is innocent, then the guilt of the accused is not shown by the full measure of proof the law requires and the Defendant should be acquitted.

Now, ladies and gentlemen, all 12 of you must agree before you can reach any verdict in this case. Your verdict must be the verdict of each and every juror. You are the sole judges as to the weight that should be given to all the testimony in this case. As I told you, it's my duty to decide the law, it is your duty to decide the facts. I don't want you to think from any ruling I have made or in any of these charges, that I think one way or the other about the facts of this case. You take the testimony of the witnesses, all the proper and reasonable inferences therefrom, apply your good common sense, and in an impartial and honest way, determine what you believe to be the truth. You should weigh all the evidence and reconcile it if you can reasonably do so. But if there is irreconcilable conflicts in the evidence, you ought to take that evidence which you think is worthy of credit and give it just such weight as you think it's entitled to receive.

In doing so, you may take into consideration any interest which any witness might have been shown to have in the outcome of this case. If you believe that any material part of the evidence of any witness was wilfully false, you may disregard all of the testimony of such witness.

Now with regard to the alleged confession or statements of the Defendant in this case. You may consider all of the facts and circumstances surrounding the taking of the alleged confession or statement in determining the weight and credibility, if any, which you give to the alleged confession or statement. In exercising your exclusive prerogative of determining the credibility of the evidence or the weight to which the evidence is entitled, you shall consider the circumstances under which the confession was obtained, the means by which it was elicited, including the situation and mutual relations of the parties.

Now while I determine the voluntariness of the confession, you, the jury, determine its weight and credibility and you may disregard an alleged confession and you may disregard an alleged confession which is unworthy of belief or in which you entertained a reasonable doubt as to its truth.

Now the fact in this case that the Defendant did not testify cannot be considered in determining the Defendant's guilt or innocence and no inference nor conclusion should be drawn by you about that fact nor should that fact have any weight with you in reaching a verdict. Now as I stated to you in this case, there are two counts contained in the indictment charging this Defendant in Count I with the offense of murder of Adam Pickens during robbery and Count II with the offense murder of J.R. Bailey during robbery. You must consider the evidence as to each count separately and determine as to the charge contained in each count, whether the Defendant had been proved guilty of the offense charged therein beyond a

reasonable doubt. If you find from your consideration of all the evidence that the State has proved beyond a reasonable doubt each of the necessary elements of the capital offense of murder during robbery as to Count I of the indictment, then your verdict should be that you find the Defendant guilty of the offense of capital murder of Adam Pickens during robbery as charged in Count I of the indictment.

Now if, on the other hand, from your consideration of the evidence or lack of evidence, you are not convinced the State has proven each of the essential elements of the offense of capital murder of Adam Pickens during robbery beyond a reasonable doubt, then you must find the Defendant not guilty of the offense of capital murder as charged in Count I of the indictment. Now, as I told you, embraced within the offense of murder of Adam Pickens during robbery as charged in Count I of the indictment is a lesser included offense of murder. If, after your consideration of the evidence or lack of evidence, you are not satisfied that the Defendant is guilty of the principal offense of capital murder as charged in the indictment, then you must next consider the evidence as to the lesser included offense of murder and determine whether the Defendant has been proved guilty of such lesser included offense beyond a reasonable doubt. If you find from your consideration of all the evidence the State has proved each of these elements of the lesser included offense of murder beyond a reasonable doubt, then your verdict should be that you find the Defendant guilty of the offense of murder embraced within the charge of capital murder contained in Count I of

the indictment. If, on the other hand, from your consideration of the evidence or lack of evidence you are not convinced the State has proven the essential elements of the lesser included offense of murder beyond a reasonable doubt, then you must find the Defendant not guilty of the offense of murder of the lesser included offense contained in Count I of the indictment. Now also as to Count II of the indictment embraced within that offense of murder of J.R. Bailey during robbery as charged in Count II, is the lesser included offense of murder also. If, after consideration of the evidence or lack of evidence, you are not satisfied that the Defendant is guilty of the principal offense of capital murder of J.R. Bailey as charged in the indictment, you must next consider the evidence as to the lesser included offense of murder and determine whether the Defendant has been proved guilty of such lesser included offense beyond a reasonable doubt. If you find from your consideration of all the evidence the State has proved the elements of the lesser included offense of murder beyond a reasonable doubt, then your verdict should be that you find the Defendant guilty of the offense of murder embraced within the charge contained in Count II of the indictment.

If, on the other hand from your consideration of the evidence or lack of evidence you are not convinced the State has proven the essential elements of the offense of capital murder of J.R. Bailey during a robbery — of murder, the lesser included offense under the capital offense as charged in the indictment, then it would be your duty to find the Defendant not guilty of the offense of murder, a

lesser included offense under Count II of the indictment.

Now after you have received these instruments, you will be given forms for the recording of your verdict and you'll be taken by the bailiff to the jury room where you will begin your deliberations. When you have reached a verdict in this case, you will complete one of the forms in the form given to you and one of your number to be selected and designated by you will sign the verdict of the jury as the foreman or forewoman as the case may be. Again, the verdict returned by you must be the verdict of all 12 of you and when the verdict has been reached, it will be necessary for you to return to the Court and give your verdict.

In the meantime, until you have reached a verdict and it's been received by this Court and you have been discharged, it is absolutely necessary that all of you stay together and you will not separate even for a moment.

Now I have before me the jury verdicts as to each count in this indictment. I will read these verdicts to you. The order in which I read them to you, is the order in which they were handed to me. You will not think that I think one way or the other by virtue of what verdict form I read first.

"We, the jury, find the Defendant, Victor Remar Stephens, guilty of the capital offense of murder of Adam Pickens during robbery in the first degree as charged in Count I of the indictment."

"We, the jury, find the Defendant, Victor Remar Stephens, guilty of the Capital offense of murder of J.R. Bailey during robbery in the first degree as charged in Count II of the indictment."

"We, the jury, find the Defendant, Victor Remar Stephens, not guilty of the capital offense of murder of Adam Pickens during robbery in the first degree as charged in Count I of the indictment, but guilty of the lesser included offense of murder."

"We, the jury, find the Defendant, Victor Remar Stephens, not guilty of the capital offense of murder of J.R. Bailey during robbery in the first degree as charged in Count II of the indictment, but guilty of the lesser included offense of murder."

"We, the jury, find the Defendant, Victor Remar Stephens, not guilty as to the charge in Count I of the indictment."

"We, the jury, find the Defendant, Victor Remar Stephens, not guilty as to the charge in Count II of the indictment."

Now, before you begin your deliberations, it's necessary that we take up some matters outside your presence. Hopefully, that will be very short, but sit quietly for a moment.

Circuit Court of Hale County, Alabama

Discussion of Jury Charge Outside the Presence and Hearing of the Jury.

Stephens Trial

Record 776–787

THE COURT: All right. Ladies and gentlemen, we have to take up a matter outside your presence. It's now the noon hour and you've heard the evidentiary phase. The next remaining phase is the summation by the attorneys followed by the instructions from this court. Now we're going to go to lunch at this time.

While you're on break, you should not discuss this among yourselves or allow anyone to discuss it with you. Do not attempt to learn anything about this case while you're on break. So at this time, you're excused for lunch.

(Whereupon the Noon Recess was taken.)

(Whereupon the following proceedings were held out of the presence and hearing of the jury:)

MR. MORRIS: At this time Judge, the Defendant would renew its motion to exclude the State's evidence and in the alternative, to direct a verdict on behalf of the Defendant and we incorporate as grounds, the same grounds that were previously given to the Court.

THE COURT: Denied.

Now I'm going to charge on capital murder, I'm going to charge on murder during robbery of J.R. Bailey and Pickens and I'm going to also state to them that

embraced within that offense is the lesser included offense of felony murder.

MR. MORRIS: You said you were going to introduce the charge?

THE COURT: I'm going to read the indictment.

I'll read that right out of the charge book.

I tell them that the defendant in this case is charged in Count I with murdering during robbery of Adam Pickens and —

MR. MORRIS: I'm sorry, I didn't understand.

THE COURT: That each of these is a capital offense punishable by death. Embraced within that charge is the lesser included offense of felony murder and that the defendant having been charged with having committed a capital offense for which punishment would be his imprisonment, parole of death. I'll introduce his plea.

MR. MORRIS: I think there is a plea of not guilty and not guilty by reason of insanity.

THE COURT: The burden will shift to you on that.

MR. SULLIVAN: Your Honor, we move to exclude his defense of not guilty by reason of mental disease or defect. There's been absolutely zero evidence to that in this

matter and the jury should not even be instructed on that particular basis.

MR. MORRIS: Judge, I think the law of self–defense and the law of not guilty by reason of insanity is somewhat confused. The burden doesn't shift to me to prove self–defense.

MR. GREENE: This business of shifting probably is maybe a bad nomenclature.

MR. MORRIS: I don't believe the burden is on me to prove the plea of not guilty by reason of insanity.

THE COURT: I think the burden is on the State to negate it.

MR. GREENE: Self–defense is a whole new ball game here.

THE COURT: I'll announce the defendant's plea is not guilty and I suppose self–defense. Then as the elements of murder unfold, it will be that he was not acting in self–defense and then I'll define self–defense. Now the jury may wonder why I'm doing that, but I'll put it in there because he says when he walked in, Bailey started shooting, and he stuck his gun up and started shooting back. I guess under some broad theory, you can get that in.

MR. MORRIS: Are you charging out the not guilty by reason of insanity?

THE COURT: There's no evidence of that.

MR. MORRIS: Judge, there may be. In his plea, I mean, in his confession, he said that he was under acid and 8–balls of cocaine and I guess the question is, can a person labor under the voluntary influence of the controlled substance to the degree that he doesn't have the mental capacity to form the necessary criminal intent.

MR. GREENE: I don't think the evidence shows anything other than he indicated that he had been using some drugs. One of the statements — I don't think that raises any issue as to his insanity. There's no contention on his part that he didn't know what he was doing or he doesn't understand it. His statement was very clear about everything that did happen, as opposed to being unclear about it as a result of the drugs.

MR. MORRIS: It does not. His statement says, and I can't remember the details.

MR. SULLIVAN: Judge, there's not any evidence here of —

THE COURT: I don't see any.

MR. SULLIVAN: I don't see any, any way you look at it. The burden is on him and he hasn't established it. I don't think it should go to the jury at all on that issue.

MR. MORRIS: Are your charging that plea out?

THE COURT: I'm charging it out.

MR. MORRIS: We except.

THE COURT: All right. Then I'll talk about presumption of innocence, burden of proof on the State, and the jury pattern on presumption of innocence, pattern charge on burden of proof and pattern charge on reasonable doubt. I'll instruct the jury that the indictment in this case is not evidence. That the argument of counsel is not evidence. I'll read the indictment. I usually read the indictment at the very front end. It doesn't matter. But then I'll go into this pattern charge on capital murder.

(Whereupon on off–the–record discussion was held between counsel and the Court.)

MR. MORRIS: Let me ask the Court this. Wouldn't the Court find that there would be an inconsistent verdict if they returned an indictment on one count and not on the other in light of the evidence?

THE COURT: I think they can come back and say guilty on Pickens and not guilty on Bailey or whatever. Also embraced within the capital offense is the lesser included offense of murder. I'll have to instruct them on robbery, and I'll not go back into the elements of robbery again.

MR. SULLIVAN: You're saying in the murder itself, you're going into robbery?

THE COURT: Murder during robbery.

MR. SULLIVAN: Murder during robbery makes it capital.

THE COURT: No. It depends on when intent was formed. Murder during robbery can be noncapital.

My understanding of the law is that way. If he says we didn't go in there to kill anybody, just things went down wrong, the man started shooting and we shot back —

MR. SULLIVAN: No, sir. I disagree with you. I think the law is that if there's an intentional killing during the course of, which comes in the immediate flight of — when you're going in or while you're in the store when the — actually taking place, that you have a capital offense. I think that the difference, as far as the lesser include offense is concerned, is that on the murder charge that there was no robbery — that the jury is making the determination that there was no robbery. It was just an intentional killing.

THE COURT: It might tend to confuse them if I tell them that it was murder during robbery, capital, and murder during robbery, noncapital.

MR. SULLIVAN: I don't think so.

THE COURT: If they went in with the idea that they were going to rob and kill whoever was in there, that's capital. If they went in there and things went wrong, they didn't intend to go in there and —

MR. MORRIS: Well, the Defendant, he goes in there, supposedly to rob the guy and the deceased starts shooting —

MR. SULLIVAN: I don't think it matters whether he came in — if he comes in to commit a robbery and that robbery starts going bad and he decides to kill the folks or in fact if he robs the place and then he's going out of the door and you're all of a sudden — all of a sudden he has, during the robbery, turns around and says that, "I'm going to shoot them," I think it's capital. I don't think it makes any difference when it is. They don't have to come in with intent to kill them and rob them. I think there's adequate case law on that.

MR. MORRIS: I think I'm entitled to a manslaughter charge. That would go to Pickens. If you take his statement, you've got Bailey firing when he walked in. Now it can't be self–defense as to Pickens, Pickens isn't armed. Now I believe you can have an intentional killing of Pickens without all the other elements of murder which would amount to manslaughter. I'm not talking the homicide and all those

other things, I'm talking about what I used to call first degree manslaughter.

MR. GREENE: Let's assume for argument that he's totally innocent of any knowledge whatsoever and just walks in the store and he gets shot at and starts running firing. Well, under that theory, he's not guilty of anything, whether or not Adam Pickens was armed would be meaningless at that time because there's no evidence that Adam Pickens tried to defend, shoot or do anything and the guilty party therein would be Mr. Bailey who, under this theory was the perpetrator of the difficulty or the other defendant who starts the difficulty.

This man just walked into it and defended himself and whatever innocent bystander got shot would not be his fault. I don't think that would give rise to manslaughter. It would give rise to self–defense, but he was not intentionally trying to kill either party which would be an element of murder and provocation which, you know, which would drop it to manslaughter. But he was simply defending himself from an assault by Mr. Bailey. Now that's taking it in its best light. I don't see how manslaughter would come up. If you had some argument between them, some difficulty between them and Bailey went for his gun and he went for his and "Pop" got shot, that could well be manslaughter. If there

was no intent to rob, period, at all, I don't see manslaughter.

MR. MORRIS: I think I'm entitled to that, Your Honor.

THE COURT: I don't think there's any evidence to charge on manslaughter. Where does self–defense fit in to the capital charge?

MR. GREENE: Self–defense is self–defense. If he acted in self–defense, period. If he was defending himself as to the murder —

THE COURT: I think I've got to charge in the capital portion that they would have to find that he was not acting in self–defense.

MR. GREENE: I think, Judge, in the course of your charge, you would make reference to the fact that the defendant has entered a plea of not guilty and composed within that plea is his plea of self–defense. If the jury found he acted in self–defense in this whole thing, then, of course, they'll not find him guilty at all. I mean, they find no robbery, they find nothing. I mean, he's set upon.

Now maybe we're getting too far afield.

THE COURT: In the standard pattern murder charge, when you're charging on elements, you would say in order to find this defendant guilty, you must first find that

the State has proven beyond a reasonable doubt the following elements:

1. As to Count I, Adam Pickens is dead.

As to Count II, J.R. Bailey, or either of them are dead.

2. That the Defendant, Victor Stephens caused the death as to Count I, Adam Pickens, and as to Count II, J.R. Bailey. That he died as a result of multiple gunshot wounds inflicted by the Defendant. Third, that in committing the act which caused the death of, in Count I, Adam Pickens and in Count II, J.R. Bailey, or either of them, then the Defendant acted with intent. Then you would have to say that in doing the act which caused the death, the Defendant was not justified in using whatever force upon another person as he reasonable believed was necessary in order to defend himself. What he reasonably believed at the time to be the use of imminent — use of unlawful physical force by other persons and then you go into what the force was. Deadly force and safe retreat and all that. What I'm saying is, the first charge is going to be on capital murder. There's no mention in that charge as to any elements — of proving any elements of self–defense. What I'm saying is, at the conclusion or somewhere during the capital charge of murder during robbery in the first degree, should I exclude self–defense or does it only defend against

lesser included charge of murder. It would be as to both, wouldn't it?

MR. MORRIS: The whole thing.

THE COURT: Now encompassed within this plea is the plea of self–defense, and then define self–defense. Then I'll reiterate when I get back down to the elements of murder, —

MR. MORRIS: They need to understand, I think the jury needs to understand that self–defense is a, you know, a complete bar. It's a complete defense to everything.

THE COURT: I'll put that at the front. Now the problem I have is that self–defense is not available to somebody who is committing a robbery. It just ain't a defense. That's what I'm saying. I don't know whether it should come in the capital portion or not. If they find robbery, self–defense is not a defense.

MR. MORRIS: Judge, I would like to object and except to the fact that the Court is not going to give the manslaughter charge and I contend in light of the evidence here and I except to the fact that the Court is not going to give the charge concerning killing done in a reckless manner.

THE COURT: All right. Noted.

Circuit Court of Hale County Alabama

Proceedings Outside the Presence and Hearing of the Venire

Stephens Trial

Record 385–401

THE COURT: Ladies and gentlemen, we're about to the selection process which will take us, I estimate it will be 11:00 before we're ready to place the jury in the box. I'm going to place you on break until that time and while you're on break, you're not to discuss this case among yourselves or with anyone else or allow anyone to discuss it with you. If that fact occurs, you should make that fact known to the Court and I'll inquire of you whether anytime during the evening past, whether anyone had any contact or problems with this case at all. Did anyone contact you or attempt to contact you? If so, please make that known to the Court.

(Whereupon there was no response from the venire.)

THE COURT: All right. You're excused now until 11:00 with that instruction. Thank you.

(Whereupon the following proceedings were held out of the presence and hearing of the venire:)

MR. MORRIS: Judge, I would offer to the Court, a brief, or would bring to the Court's attention, a motion previously filed. The Court is aware of a *Batson* Motion, and making it known to the Court that the basis of the *Batson* Motion is that of the 22 jurors struck, which is not including the alternate, the first 21 were black. The other juror that was struck by the State was juror number 22, which was their last strike and they struck number 106,which was Mr. Wyatt. We feel like under the language, that it's clear that through the process of jury striking, that they have systematically excluded members of the black race. Further, for the record, my client is black and we feel like that is a violation of the *Batson* case.

THE COURT: What is the composition of the venire total?

MR. GREENE: As I understand it, it's seven white five black.

THE COURT: The jury as struck is seven white and five black.

MR. GREENE: I think so.

THE COURT: What is the composition of the venire as a whole?

MR. GREENE: We've got it right here. Mr. Corley, number 17 is a white male. Mrs. Ferguson is a white female. Ms. Fondren, number 29, is a white female. Mr. Brenstead, is a white male, Lyles is a black female, Marks is a black female, 82 is a black male, 92, Travis, is a black female, 94, Tucker, is a white female, and 96 is Beth Williams, and that's a white female, and 101 is Willie Williams, a black female, and the alternates are Michael G. Harris, number 38, a white male, and Mr. Tubbs, number 93, white male.

THE COURT: Who's the last juror struck?

MR. GREENE: Number 106, Mr. Wyatt.

THE COURT: Last Juror? The last juror, number 38, that was the last person struck period, was number 38, Michael G. Harris, by the State; is that correct?

MR. MORRIS: That's true, as an alternative.

THE COURT: All right. The composition of this jury is seven and five. Now depending on the alternates, it could be eight and four.

MR. GREENE: Eight and five if you keep the alternate.

THE COURT: All right. You've made a prima facie showing, justify your strikes.

MR. GREENE: First of all, we did not attempt to strike jurors solely because of their race. We did, however, strike jurors for reasons I would like to state in the record at this time. I'll try to take them in order and state those reasons as best I can.

We struck juror number 68, Mr. Mickens, his position on capital punishment, which, I think is already on record.

We struck juror number 4, Mrs. Ball, on her position on capital punishment.

We struck juror number 5, who's also a Ball, as I understood it. Mr. Ball, the information was that he had answered affirmatively on drugs, that is, that he, or some member of his family or some close personal friend being so involved. The information also received was that he was some sort of part–time preacher and that his son had been in some serious trouble dealing with drugs and/or criminal activity. That was from law enforcement investigation. Finally, he indicated he did not want to serve and would ask to be let off, as we understood it. Now number 76 was our next strike, and that was Mr. Patton, who had answered affirmatively on our question concerning previous knowledge or

association of any type of criminal offense. Our office had prosecuted him for night hunting. We seized his weapons and sold them and he had also been convicted of a DUI on other occasions. Number 47 was a Margaret Hood, and we struck her because she asked off and had quite a bit to say about lack of transportation and inability to get here and she was concerned and wouldn't be able to pay attention, etc. Finally, it seems as if she and her husband have a history or problem in the child support court. Her husband actually being prosecuted and even done some time in the jail with reference to that. Of course, our office handles the child support program. Now that was in Perry County, there was some type of connection, a cousin or something. That's the reason we're so familiar with them. Number 46 was a Mattie Hollifield. We struck her because she had been arrested and charged with worthless checks and similar type offenses on several different occasions.

We struck juror number 36, which was Carolyn Harris. The information gathered during voir dire was that she was young, single and unemployed and our information in our investigation prior to that was that her brother is a defendant or has been a defendant in a criminal case which is being prosecuted.

We struck juror number 87, Vinie P. Spence. The information was that her sons had been in some very serious criminal offenses. We just felt like she would not be a good State's juror in this case.

We struck juror number 49, Dorothy Johnson. Information from investigation was that she had been a defendant in small claims court and been served

with numerous civil suits. She was not particularly well thought of and recommended to us a juror to strike. In voir dire, she seemed to be extremely responsive to the Defendant's questions. I noticed that she was chewing gum and not particularly concerned about this and felt like she would not be a proper juror to serve on this jury.

Number 18 was our 10th strike, Betty Cottrell. She asked off this jury. She did not want to serve and she answered our questions with reference to involvement and knowledge of criminal activity in the affirmative. She indicated that she or someone very close to her had been charged with some criminal offense. Our next strike was number 80, Willie Pratcher. This is the juror who indicated that he lived in Atlanta and seemed to be interested in not serving. He was wearing sunglasses and that to me has always been a point. When I find jurors doing that, unless there's a real good reason for it, generally, they do not tend to make very good State jurors. he's the only one in that position. He also was sitting next to a Mr. Gray. Defense counsel brought to the Court's attention, of course, our attention at the same time, that Mr. Gray, a juror struck for his feelings on capital punishment, had approached defense counsel discussing or talking or making some comments about burying the guy or something of that nature and Mr. Pratcher seemed to have some type of relationship with him. I felt uncomfortable leaving him on the jury knowing the propensity of the Juror Gray to verbalize his position.

Number 59 was struck as our 12th strike. That's Miss Gracie M. Lewis. Our information is that she was single and unemployed. Also, our investigative

information indicated that her son had been involved in a death or a killing. Information was not clear as to whether it was some type of automobile accident or whether it was some criminal charge, but in any event, her son was involved in it in some manner and we felt like she could not stay on as a juror.

Our 13th strike was number 85, Willie Shelton. I think it's Shelton. This juror, in the course of individual voir dire, is from the community and, of course, was listed here, her marital status here, as separated. She was very insistent on that. She reported that she lives in this particular community and never heard anything about this case whatsoever. We find that extremely strange and based on that, felt like she should not remain as a juror in this case.

Number 97, Essie Lee Williams, on individual voir dire, she seemed to be familiar with the case which, being from the general area of this offense, that would seem to be a plus, but her individual voir dire, she seemed to be very concerned and communicated to us that she was well aware of the fact that one of the men had lived to tell all about it and she was waiting very much to hear that. Seemed to be very concerned about that. Of course, we're very familiar with the evidence in this case where there is a proposed dying declaration from the deceased, "Pop", indicated some words to the effect that some two white men did it. We felt that leaving her on the jury with anticipation of testimony would certainly be detrimental to us.

Our 15th strike was 102, Bertha L. Wilson. Sheriff's Office recommended this juror be struck. The

Sheriff himself indicated he had known her for quite a long time and felt that she was extremely anti–establishment. That her mother was considered by him to be a person he thought well of, but he was concerned with Mrs. Wilson. He believed that her husband had been previously in some type criminal trouble. We felt that during the voir dire, she seemed to be very unconcerned about this very serious matter that she was about. We struck her on that basis.

Our 16th strike was number 35, Annie Harris. She had reported from her information as being single, unemployed and relatively young. The note I made was that she knew nothing about the case.

Our 17th strike was number 98, and that was Kenneth L. Williams. Observations by our group in observing the jurors was that this man was once again, seemed to be involved with the juror, Mr. Gray. He seemed to be associating with him. His general appearance was very rough and we simply felt like the combination of the two justified and required us to remove him from the jury panel.

Our 18th strike was number 9, Ruby Lee Brown. Now she, according to our information, had had a husband who had been killed in a homicide. That seemed to be a plus. Sheriff's Office was very concerned that she was extremely negative about that particular case and we felt that leaving her as a juror would not be wise under these circumstances. She was not happy or pleased with the situation, that we should remove her, so we did.

Juror number 40, Mrs. Hayes, Lelia Hayes, getting to the point where some of these jurors had some

pluses. We were concerned about keeping her. Mrs. Hayes worked with Mrs. Bailey at the nursing home. However, the reaction during individual voir dire concerning that, she seemed to be totally removed from that situation and totally unconcerned about it and based on that, we felt there might be some animosity or something we didn't realize with Mrs. Hayes. We struck her on that basis. Number 43, Mrs. Hobson, was our next strike and this was a juror we had decided that we would leave on the jury or keep on the jury, we felt that she was all right, from our standpoint. However, our information was that she was requesting to get off the jury and had requested to get off the jury. She had had an invalid husband and the storm last night essentially removed her for those reasons. Otherwise, we would have kept her.

Our 21st strike was number 59 — 39, Sarah Harris. The information reported was that she had kins–people who had been in criminal trouble and though we had otherwise felt that she was all right, that information caused us to remove her. Juror number 106 was Mr. Wyatt, who had indicated he had been in criminal trouble and had been prosecuted at some point in time, though he was extremely positive in his individual voir dire, that information, we felt, required that he be removed.

MR. JOHNSON: He was a white male.

MR. GREENE: And juror number 38, was Mr. Michael Harris, who indicated that he had a cousin at some point in time, 15 years ago, that had been involved in some type of criminal activity and we struck him on that basis.

THE COURT: Is that all?

MR. GREENE: That concludes all our strikes. We would like to mention for the record that the defense strikes were of all white males or females, for whatever benefit that is.

THE COURT: Cross examination

MR. MORRIS: Judge, I'm not sure that I have any cross. I would make it known for the record on I think there were three people that they mentioned and that was Mr. Williams, Mr. Pratcher, and a Mr. Pratcher. Mr. Kenneth Williams and Mr. Willie Pratcher and one other individual that I believe the District Attorney eluded to as sitting near or being around Mr. Gray. I would make it known to the Court, I believe the Court would recall that during yesterday's continuous voir dire that lasted into the night, Mr. Gray was an occupant on the front roew with a Mr. Corley sitting on one side and a Mr. Collins sitting on the other. Both of whom were white. To my knowledge, there was not another black individual on the front row yesterday. So I would differ with the information of the State in that regard. Now the information that the District Attorney has concerning things like they had some relatives involved in some crimes, being in small claims court where they're been sued, matters like this, in light of the — the fact that the State said they didn't respond to any questions or didn't seem to know anything about it, we content that the jurors by comparison that were left on this case knew nothing about it. Starting with Mr. Grinstead, Mrs. Fondren, Mr. Corley, also responded that they knew nothing about it. A Mrs. Lyles responded that she knew something about

it. She was left. A black female. Now Mrs. Marks responded that she knew something about it, a black female. A Mr. Ryans responded that he knew something about it, a black male. A Mrs. Travis responded that she knew something about it, a black female. Mrs. Williams responded that she knew something about it, a black female, and our contention is that it's clear that the fact that someone knows nothing about it played no part and we contend that it was strictly on the basis of race in this matter.

As to Mrs. Ruby Lee Brown, she stated in voir dire that her husband was a victim of a homicide and that the victim was prosecuted and there would be no other — I believe she also responded — I believe she had a bumper sticker —I take that back, Your Honor. That's now true. I'm saying that there would be no reason in the world that I can think of why she would not be an excellent juror other than race. She was struck.

Further, we contend that the last four strikes that they enumerated, starting with Mrs. Brown are vague and very indecisive answers. For instance, Mrs. Hayes, number 19 strike, number 40 on the veniore list, stated that she knew Mrs. Bailey and that she knew her and knew her daughter and had an association with Mrs. Bailey who's in the nursing home where she's employed as well as knew her daughter well. No conceivable reason that the defense can find, no conceivable reason that the defense can find, no conceivable reason that she would not make an excellent juror for the State, other than the fact that she's black.

Now there's vague allegations on number 43, they say that her husband had been on some sort of problem. Mrs. Hobson, we content that's just a smoke screen there. And then one of the persons up here, he had some sunglasses on. The defense contends certainly that is no justifiable reason. Now that's all I have.

MR. GREENE: Our only response is that one of the first things as to Mr. Gray, it was reported to us and made quite some concern as to Mr. Gray this morning concerning who he might talk to. Now this is the information we got from the people we asked to try to pay attention. Now Mr. Williams, Gray, Patton and Pratcher, were sitting together this morning in the back of the courtroom. We felt that that might be a matter of concern. We point out for the record that the last, I think, five strikes for the State involved two white males we thought we had some problems with and three black females that we were concerned about. We also thought these three black females might make us good jurors, but we had reason, we felt, overrode our desires to retain them.

THE COURT: Is it your testimony as an officer of this Court that the reasons for striking were nonracial and not based upon the race of any particular juror?

MR. GREENE: It is, Your Honor. I think the jurors we have before us bears that out. There's black males serving, some five blacks in total. We have an abundance of females on this jury in a capital murder case. I think we've got a jury that well reflects, based upon peoples backgrounds, Your Honor, and on that basis, a fair racial mixture of males and females, black and white, in this community. We arrived at this through exhaustive and argumentative process.

MR. MORRIS: Could I inquire of the Court, and I am aware the Court is a native of this county, as to the racial composition of this county, approximately?

THE COURT: Approximately 55/45 black over white. Somewhere in that neighborhood. It could be 60/40. It changes from time to time. I don't know the population. The voter registration is not that — there's a little more white than black. Now that's county–wide, but I can't tell you the population.

MR. GREENE: Now while we're on that —

THE COURT: You had 54 or 57 from the total venire remaining.

MR. GREENE: We had 16 white males, 6 black males, 16 white females and 20 black females to strike from at the end, as I recall. Somewhere close to that.

THE COURT: All right. The Court finds that the motion is not well–taken and I'll overrule the motion.

APPENDIX E

Alabama Code §§ 13A–6–2 and 13A–5–40(b)

§ 13A–5–40. Capital offenses.

(a) The following are capital offenses:

(1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant;

(2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant;

(3) Murder by the defendant during a rape in the first or second degree or an attempt thereof committed by the defendant; or murder by the defendant during sodomoy in the first or second degree or an attempt thereof committed by the defendant;

(4) Murder by the defendant during a burglary in the first or second degree or an attempt thereof committed by the defendant;

(5) Murder of any police officer, sheriff, deputy, state trooper, federal law enforcement officer, or any other state or federal peace officer of any kind, or prison or jail guard, while such officer or guard is on duty, regardless of whether the defendant knew or should have known the victim was an officer or guard on duty, or because of some official or job–related act or performance of such officer or guard;

(6) Murder committed while the defendant is under sentence of life imprisonment;

(7) Murder done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Murder by the defendant during sexual abuse in the first or second degree or an attempt thereof committed by the defendant;

(9) Murder by the defendant during arson in the first or second degree committed by the defendant; or murder by the defendant by means of explosives or explosion;

(10) Murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct;

(11) Murder by the defendant when the victim is a state or federal public official or former public official and the murder stems from or is caused by or is related to his official position, act, or capacity;

(12) Murder by the defendant during the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger . . .

(b) Except as specifically provided to the contrary in the last part of subdivision (a)(13) of this section, the terms "murder" and "murder by the defendant" as used in this section to define capital offenses mean murder as defined in section 13A–6–2(a)(1), but not as defined in section 13A.6–2(a)(2) and (3). Subject to the provisions of section 13A–5–41, murder as defined in section 13A–6–2(a)(2) and (3), as well as murder as defined in section 13A–6–2(a)(1), may be a lesser included offense of the capital offenses defined in subsection (a) of this section.

Ala. Code § 13A–6–2;

§ 13A–6–2. Murder.

(a) A person commits the crime of murder if:

(1) With intent to cause the death of another person, he causes the death of that person or of another person; or

(2) Under circumstances manifesting extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to a person other than himself, and thereby causes the death of another person; or

(3) He commits or attempts to commit arson in the first degree, burglary in the first or second degree, escape in the first degree, kidnapping in the first degree,

rape in the first degree, robbery in any degree, sodomy in the first degree or any other felony clearly dangerous to human life and, in the course of and in furtherance of the crime that he is committing or attempting to commit, or in immediate flight therefrom, he, or another participant if there be any, causes the death of any person.

(b) A person does not commit murder under subdivisions (a)(1) or (a)(2) of this section if he was moved to act by a sudden heat of passion caused by provocation recognized by law, and before there had been a reasonable time for the passion to cool and for reason to reassert itself. The burden of injecting the issue of killing under legal provocation is on the defendant, but this does not shift the burden of proof. This subsection does not apply to a prosecution for, or preclude a conviction of, manslaughter or other crime.

(c) Murder is a Class A felony; provided, that the punishment for murder or any offense committed under aggravated circumstances, as provided by article 2 of chapter 5 of this title, is death or life imprisonment without parole, which punishment shall be determined and fixed as provided by article 2 of chapter 5 of this title or any amendments thereto. (Acts 1977, No. 607, p. 812, § 2005)

Ala. Code. § 13A–5–40.

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(3)

NO. 91-66

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1991

VICTOR STEPHENS,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. SHOULD THE COURT GRANT CERTIORARI AS TO THE ISSUE REGARDING THE TRIAL COURT'S REJECTION OF THE JURY'S SENTENCE RECOMMENDATION?

A. Should the Court grant certiorari as to this issue where it was not properly raised in the courts below?

B. Should the Court grant certiorari as to this issue where it is precluded by Spaziano v. Florida?

II. SHOULD THE COURT GRANT CERTIORARI AS TO THE ISSUE REGARDING THE JURY INSTRUCTION ON REASONABLE DOUBT?

A. Should the Court grant certiorari as to this issue where it was not properly presented in the courts below?

B. Should the Court grant certiorari as to this issue where it is not worthy of certiorari review?

III. SHOULD THE COURT GRANT CERTIORARI AS TO THE ISSUE INVOLVING THE TRIAL COURT'S REFUSAL TO CHARGE ON A LESSER INCLUDED OFFENSE?

A. Should the Court grant certiorari as to this issue where it was not properly raised in the courts below?

B. Should the Court grant certiorari as to this issue where it is not worthy of certiorari review?

IV. SHOULD THE COURT GRANT CERTIORARI AS TO THE ISSUE REGARDING THE USE OF PEREMPTORY STRIKES AGAINST BLACK JURORS WHERE THIS ISSUE IS NOT WORTHY OF CERTIORARI REVIEW?

PARTIES

The caption contains the names of all parties in the courts below.

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OPINIONS BELOW

The decision of the Court of Criminal Appeals of Alabama affirming petitioner's conviction and death sentence is included as Appendix B to the petition. The decision of the Supreme Court of Alabama affirming the decision of the Court of Criminal Appeals is included as Appendix A to the petition.

JURISDICTION

As to the issue of whether the prosecution discriminated on racial grounds in its use of peremptory strikes, this Court has jurisdiction pursuant to 28 U.S.C. §1257(3). As to the other issues raised, this Court has no jurisdiction because they were not properly raised in the courts below.

CONSTITUTION PROVISIONS INVOLVED

Petitioner claims the violation of his rights under the Fifth Amendment to the United States Constitution, which provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Petitioner claims the violation of his rights under the Sixth Amendment to

the United States Constitution, which provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Petitioner claims the violation of his rights under the Eighth Amendment to the United States Constitution, which provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Petitioner claims the violation of his rights under the Fourteenth Amendment to the United States Constitution, which provides in relevant part as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was indicted in 1986 for the capital offense of murder during a robbery, stemming from the killing of two elderly men during the robbery of a rural store. Petitioner was convicted of this offense in December 1987. The jury recommended a sentence of life imprisonment without parole. After an independent weighing of the aggravating and mitigating circumstances, the trial court rejected the jury's recommendation and sentenced petitioner to death.

On August 3, 1990, the Court of Criminal Appeals affirmed petitioner's conviction and death sentence. On March 15, 1991, the Supreme Court of Alabama affirmed the decision of the Court of Criminal Appeals.

ARGUMENT

I. THE COURT SHOULD DENY CERTIORARI AS TO THE ISSUE REGARDING THE TRIAL COURT'S REJECTION OF THE JURY'S SENTENCE RECOMMENDATION.

A. The Court should deny certiorari as to this issue because it was not properly raised in the courts below.

Petitioner asks this Court to consider whether a particular standard is constitutionally required where a trial court rejects a jury's sentence recommendation and imposes a sentence of death. The Court should deny certiorari because this issue was not properly raised in the courts below.

No issue regarding the trial court's override of the jury's recommendation was raised in the Court of Criminal Appeals of Alabama, and

that court did not decide the issue (See Appendix B to the petition). Nor was the issue raised in the petition for writ of certiorari or the supporting brief to the Supreme Court of Alabama (See Appendix A to the response, a copy of said petition and brief). While petitioner did argue that his sentence was improper, he did so only on the ground that the jury's weighing of the aggravating and mitigating circumstances was correct; petitioner did not contend that any particular override standard was applicable and did not even mention the federal constitution or federal law with regard to this argument (See, Appendix A to the response, p. 8-9 of the petition, pp. 29-30 of the brief). The opinion of the Supreme Court of Alabama simply affirmed the decision of

the Court of Criminal Appeals (See Appendix A to the petition).

The jury override issue was first raised in petitioner's application for rehearing to the Supreme Court of Alabama. (See Appendix D to the petition D-90 through D-92). This application for rehearing was denied without an opinion. (See Appendix B to this response, a copy of the notification from the lower court).

In order for this court to have jurisdiction to review the decision of the highest court of a state, a federal question must be distinctly presented below. See, Herndon v. Georgia, 295 U.S. 441, 442-443 (1935); see, House v. Road Improvement District No. 2, 266 U.S. 175 (1929). Questions first presented to the highest state court on application for rehearing generally come

too late for consideration by this Court. Radio WOW Inc., v. Johnson, 326 U.S. 120, 128 (1945). One exception to this rule exists where the state court actually entertains the question and decides it. Henderson v. Georgia, 295 U.S. at 443-444. There is no indication that this occurred here, however, because the Supreme Court of Alabama summarily denied the application for rehearing without an opinion. Such a summary denial does not constitute a reviewable judgment. Consolidated Turnpike Co. v. Norfolk & O.V.R. Co., 228 U.S. 326, 333-334 (1913). The Court therefore should deny certiorari.

B. The Court should deny certiorari as to this issue because petitioner's argument is precluded by Spaziano v. Florida.

Petitioner asks this Court to decide whether the jury override standard of Tedder v. State, 322 So.2d 908 (Fla. 1975), is constitutionally required. The Court should deny certiorari because petitioner's argument is precluded by Spaziano v. Florida, 468 U.S. 447 (1984).

In Spaziano the Court considered whether a trial judge could under any circumstances override a jury's recommendation of life imprisonment. The Court held that there was no constitutional right to a jury's participation in capital sentencing, and thus that a jury's decision could be overridden.

Under Spaziano, the State of Alabama could eliminate entirely the jury's role in sentencing. Petitioner

has no logical argument that any particular standard for overriding a jury's recommendation is constitutionally required.

For the above reasons the petition is due to be denied as to this issue.

II. THE COURT SHOULD DENY CERTIORARI AS TO THE ISSUE REGARDING THE JURY INSTRUCTION ON REASONABLE DOUBT.

A. The Court should deny certiorari as to this issue because it was not properly presented in the courts below.

Petitioner asks this Court to consider whether the jury charge regarding reasonable doubt violated due process. The Court should deny certiorari because this issue was not properly raised in the courts below.

No issue regarding the jury charge was presented to the Court of Criminal Appeals of Alabama, and that court did not decide the issue. (See Appendix B to the petition). Nor was the issue raised in the petition for writ of certiorari to the Supreme Court of Alabama. (See Appendix A to this response, a copy of said petition and supporting brief). The opinion of the Supreme Court of Alabama simply affirmed the decision of the Court of Criminal Appeals. (See Appendix A to the petition).

The jury charge issue was first raised in the Alabama appellate courts in petitioner's application for rehearing to the Supreme Court of Alabama. (See Appendix D to the petition, D-90 through D-92). This

application for rehearing was denied without an opinion. (See Appendix B to this response, a copy of the notification from the court).

Petitioner cannot argue that Cage v. Louisiana, 59 U.S. L.W. 3361 (November 13, 1990), the case upon which he relies, was decided so recently that he could not have raised the issue before the Alabama Supreme Court. While petitioner's brief and petition were sent to the Supreme Court of Alabama on October 5, 1990, his case was not decided by that court until March 15, 1991, more than four months after the Cage decision. Petitioners made no attempt, by supplemental brief or otherwise, during this period to bring Cage to the attention of the Alabama Supreme Court. Petitioner thus

cannot claim that the timing of the Cage decision prevented him from presenting this issue properly.

In order for this Court to have jurisdiction to review the decision of the highest court of a state, a federal question must be distinctly presented below. See, Herndon v. Georgia, 295 U.S. 441, 442-443 (1935); See House v. Road Improvement District No. 2, 266 U.S. 175 (1924). Questions first presented to the highest state court on application for rehearing generally come too late for consideration by this Court. Radio WOW, Inc. v. Johnson, 326 U.S. 120, 128 (1945). An exception to this rule exists where the state court actually entertains the question and decides it. Herndon v. Georgia, 295 U.S. at 443-444. There is no

indication that this occurred here, however, because the Supreme Court of Alabama summarily denied the application for rehearing without an opinion. Such a summary denial does not constitute a reviewable judgment. Consolidated Turnpike Co. v. Norfolk & O.V.R. Co., 228 U.S. 326, 333-334 (1913). The Court should therefore deny certiorari.

B. The Court should deny certiorari as to this issue because it is not worthy of certiorari review.

Petitioner asks the Court to review the jury charge herein light of Cage v. Louisiana, 59 U.S.L.W. 3361 (November 13, 1990). In so doing, petitioner requests no modification or clarification of Cage; he simply

requests the Court to apply Cage in a straightforward manner.

This Court is well aware of the relentless demands on its time to decide questions of first impression which have far-reaching impact. Petitioner asks instead for an application of settled law. This death penalty case will undoubtedly be reviewed by numerous other courts. The Court should deny certiorari and leave the issue of whether Cage requires reversal here to the lower courts.

III. THE COURT SHOULD DENY CERTIORARI AS TO THE ISSUE INVOLVING THE TRIAL COURT'S REFUSAL TO CHARGE ON A LESSER INCLUDED OFFENSE.

A. The Court should deny certiorari as to this issue because it was not properly raised in the courts below.

Petitioner asks the Court to consider whether the failure to charge on a particular lesser included offense is contrary to Beck v. Alabama, 447 U.S. 625 (1980), and Schad v. Arizona, 59 U.S.L.W. 4762 (June 21, 1991). The Court should deny certiorari because this issue was not properly raised in the courts below.

No issue regarding lesser included offenses was raised in the Court of Criminal Appeals of Alabama, and that court did not decide the issue (see

Appendix B to the petition). Nor was the issue raised in the petition for writ of certiorari or the supporting brief to the Supreme Court of Alabama (see Appendix A to this response, a copy of said petition and brief).

The lesser included offense issue was first raised in petitioner's application for rehearing to the Supreme Court of Alabama (see Appendix D to the petition, D-92 through D-95). This application for rehearing was denied without an opinion (see Appendix B to this response, a copy of the notification from the lower court).

In order for this Court to have jurisdiction to review the decision of the highest court of a state, a federal question must be distinctly presented

below. See, Herndon v. Georgia, 295 U.S. 441, 442-443 (1935); see, House v. Road Improvement District No. 2, 266 U.S. 175 (1924). Questions first presented to the highest state court generally come too late for consideration by this Court. Radio WOW, Inc. v. Johnson, 326 U.S. 120, 128 (1945). An exception to this rule exists where the state court actually entertains the question and decides it. Herndon v. Georgia, 295 U.S. at 443-444. There is no indication that this occurred here, however, because the Supreme Court of Alabama summarily denied the application for rehearing without an opinion. Such a summary denial does not constitute a reviewable

judgment. Consolidated Turnpike Co. v. Norfolk & O.V.R. Co., 228 U.S. 326, 333-334 (1913).

Nor can petitioner argue that the issue was not raised earlier because his claim became apparent only Schad was decided. Schad is an application of the earlier decision of Beck v. Alabama, supra, decided long before petitioner's trial.

For this reason the petition as to this issue should be denied.

B. The Court should deny certiorari as to this issue because it is not worthy of certiorari review.

Even if the lesser included offense issue were before the Court for consideration, review should be denied

because, for several reasons, this case is not worthy of certiorari review.

The first reason is that petitioner simply asks for a straightforward application of Beck and Schad. This Court is well aware of the demands in its time to consider issues of first impression which affect a whole range of cases. The issue here is clearly not such an issue. The decision on petitioner's claim is thus best left to the lower courts.

A second reason is that petitioner's argument is precluded by Hopper v. Evans, 456 U.S. 605 (1982). Petitioner's main contention is that he was due a charge on felony murder because his shooting of two elderly men was "unintentional." By unintentional

petitioner evidently means that it was in response to one of the men shooting at him in defense. This theory of an "unintended" killing was specifically rejected in Hopper.

Nor should the Court consider petitioner's suggestion to vacate and remand the case for reconsideration in light of Schad. First of all, as was argued above, the Court has no jurisdiction because the lesser included offense issue was not raised below. Second, Schad did not expand Beck in a way that would justify reconsideration. Instead, Schad generally limited Beck to situations where the jury has a choice only between a capital charge and acquittal. In this case the jury was also instructed on intentional murder,

a non-capital crime, as a lesser included offense (R. 838, 845-847).

For the above reasons the Court should deny certiorari as to this issue.

IV. THE COURT SHOULD DENY CERTIORARI AS TO THE ISSUE REGARDING THE USE OF PEREMPTORY STRIKES AGAINST BLACK JURORS BECAUSE THIS ISSUE IS NOT WORTHY OF CERTIORARI REVIEW.

Petitioner asks the Court to review whether the trial court abused its decision in accepting the prosecution's race-neutral reasons for its strikes of black jurors. The Court should deny certiorari because this issue is not worthy of certiorari.

The Court has recently held that the trial court's decision on whether there is racial discrimination in jury selection will be reversed only upon a

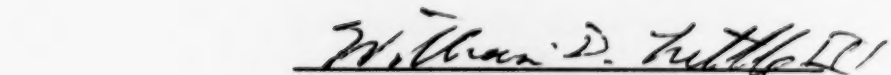
finding of an abuse of the trial court's discretion. Hernandez v. New York, 59 U.S.L.W. 4501, 4505 (May 28, 1991). The petition presents only the question of whether, under the particular facts here, the trial court abused its discretion. The Court is well aware of the demands on its resources to decide cases of far-reaching impact. The case at bar is clearly not such a case. For this reason the Court should deny certiorari.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES H. EVANS
ALABAMA ATTORNEY GENERAL
BY:



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CERTIFICATE OF SERVICE

I, William Duncan Little, III, a member of the Bar of this Supreme Court Court of the United States, do hereby certify that on this _____ day of August, 1991, I did serve three copies of the foregoing brief and appendix upon counsel for petitioner, by placing said copies in the United States Mail, first class postage prepaid and addressed as follows:

Hon. Thomas W. Evans
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Supreme Court, U.S.
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(4)

APPENDIX A

NO. 91-66

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1991

VICTOR STEPHENS,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

APPENDICES

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IN THE SUPREME COURT OF ALABAMA

VICTOR R. STEPHENS, Appellant,	*	APPEALED FROM THE CIRCUIT COURT OF HALE
vs.	*	COUNTY, AL.
	*	
STATE OF ALABAMA, Appellee.	*	SC Case No. 91-66

PETITION FOR WRIT OF CERTIORARI

Comes now the Appellant, Victor R. Stephens, by and through his attorneys of record, Blanchard L. McLeod, Jr., and J. Patrick Cheshire, and petitions this Honorable Court for a Writ of Certiorari to issue to the Court of Criminal Appeals in the above-styled cause under Rule 39 of the Alabama Rules of Appellate Procedure, and in support thereof, assigns the following, separately and severally, to-wit:

(1) Petitioner was convicted of the charge of capital murder in the Circuit Court of Hale County, Alabama on December 17, 1987, and sentenced on July 24, 1989. The Alabama Court of Criminal Appeals affirmed the judgment of the trial court with opinion on August 3, 1990. An application for rehearing was filed on August 17, 1990, and was overruled without opinion on September 21, 1990.

(2) With the application for rehearing, the Petitioner presented additional and corrected statements of fact pursuant to Rule 39 (k), ARAP, and requested the Alabama Court of Criminal Appeals to add or correct said facts in its opinion on re-hearing, which it failed to do. A copy of said additional and corrected statement of

facts are attached hereto and marked Exhibit "A", and incorporated herein by reference as if set out verbatim.

(3) The Alabama Court of Criminal Appeals case number is 2 Div. 738.

(4) The basis of this Petition for Writ of Certiorari is that the decision of the Court of Criminal Appeals failed to adequately address the issue of whether or not the prosecution performed misconduct under the principles set forth in Ex parte Branch, 526 So.2d 609 (Ala. 1987) and Batson v. Kentucky, 476 u.s. 79, 106 S.Ct. 1712, 90 L.Ed. 69 (1986), where the prosecution used 21 of its 22 peremptory strikes (95.45%) to strike blacks from the jury venire.

Batson at page 1717 states, "[t]he Equal Protection Clause (Amend. 14 U.S.

Const.) guarantees the defendant that the state will not exclude members of his race from the jury venire on account of race." Sections 1, 6 and 22, Ala. Const. 1901, combine to guarantee Equal Protection of the law.

Recently, the Alabama Supreme Court issues the opinion of Ex parte Mary Williams, S.Ct. Case No. 89-597, released June 22, 1990. In the Williams case, the Alabama Supreme Court stated on page nine:

> "With the prima facie case established, there is a presumption that the peremptory challenges were used to discriminate against black jurors, Branch, at 623; the State then has the burden of articulating a clear, specific, and legitimate reason for the challenge that relates to the particular case to be tried and that is nondiscriminatory." (emphasis added).

It is more than obvious in the opinion of the Alabama Court of Criminal Appeals that the court sought any and every means possible and totally disregarded the Batson, Branch, and Williams guidelines to effectively deny your appellant Equal Protection under the United States Constitution and the Alabama Constitution.

Your appellant would specifically cite the opinion of the Alabama Court of Criminal Appeals on pages eight and nine wherein the court states as the total basis for the logic in disqualifying the following jurors:

"8. Ms Spence--sons had been involved in 'some very serious criminal offenses.'

9. Ms. Johnson--had been a defendant in small claims curt and been served with numerous civil suits; appeared to be extremely responsive to

the defendant's questions; also, the fact that she was chewing gum was felt to indicate her lack of respect for the seriousness of the proceedings.

11. Mr. Pratcher--although his permanent legal residence was in Hale County, he was currently living and working in Atlanta, Georgia; seemed to be interested in not serving on a jury; also was wearing sunglasses in the courtroom; also, at some time during voir dire proceedings, sat next to or appeared to have some sort of relationship with a juror excused for cause because of his views against capital punishment.

13. Ms. Shelton--prosecution found it 'extremely strange' that every juror from her small community except her had heard something about the crime since it occurred in that community; also very insistent about giving her marital status as separated.

15. Ms. B. Wilson--county sheriff was acquainted with juror and recommended that she be struck because she was 'extremely anti-establishment' and because of belief that her husband had been involved in some type of criminal activity.

16. Ms. A. Harris--young, single, and umemployed; knew nothing of the facts surrounding the case.

17. Mr. K. Williams--general appearance was very rough and unkempt; also, like Juror Pratcher, appeared to be involved with a juror struck for cause because of his views against capital punishment.

18. Ms. Brown--husband a homicide victim; however, sheriff's department was concerned about her as a juror because of her belief that her husband's case had been mishandled.

19. Ms. Haynes--seemed totally removed from the situation; felt that this might indicate animosity on her part, since she worked at the nursing home where the wife of one of the victims now lived.

21. Ms. S. Harris--relatives had been in trouble with the law."

None of these strikes outlined above can in any way have "...clear, specific and legitimate reasons for the challenge that relates to the particular case to be tried and that is nondiscriminatory." Branch, at 623 as cited in Williams at page nine. Further, the Alabama Court of Criminal Appeals totally disregarded its own Avery, Madison decisions as well as Branch and Batson when it failed to even address the following point raised by your appellant.

The justification for the State's strikes ranges from the ridiculous (chewing gum, (R-390, 391), to the sublime (wearing sunglasses, R.-391). However, in all instances where the State indicated that it might have some information that was gained by investigation prior to voir dire, the State never tried to investigate this information in any manner during voir dire. As the court stated in Avery v. State, 545 So.2d 123 (Ala.Cr.App. 1988), "[t]he prosecutor could have resolved her suspicions on voir dire, but she did not do so," at page 127.

"A prosecutor's failure to engage black prospective jurors, 'in more than desultory voir dire, or indeed to ask them any questions at all, before striking them peremptorily, is one

factor supporting an inference that the challenge is based on groups bias.'" People v. Turner, 42 Cal.3d 711, 726 P.2d 102, 230 Cal.Rptr. 656 (1986). Cited in Avery, supra, at page 127. As the court affirmed in Madison v. State, 545 So.2d 94 (Ala.Cr.App. 1987) at page 99, "[a]s noted in Ex parte Branch, 526 So.2d 609 (Ala. 1987), the absence of voir dire questions directed to the challenged jurors must be weighed against the prosecution." The prosecutor, in this instant case, had the right of almost unlimited voir dire (within reason) to either confirm or deny his suspicions. But, he never chose to do so. Therefore, one must assume the systematic group exclusion of blacks. The very thing Batson sought to protect.

Additionally, the State justifies its strikes with reference to chewing gum, (R-390, 391), and wearing sunglasses, (R-391), upon its intuition. "Furthermore, intuitive judgment or suspicion by the prosecutor is insufficient to rebut the presumption of discrimination." Branch, supra, at page 623 citing Batson, supra, at page 1723.

(5) The basis of this Petition for Writ of Certiorari is that the decision of the Court of Criminal Appeals failed to adequately address the issue of whether or not the trial court abused its discretion in denying defendant's Motion for Mistrial based upon prosecutor's comment during closing arguments that the attorney for the defendant was attempting to hide

evidence from the jury since such statement was ineradicably prejudicial and imparted to the jury the impression that the defense counsel was engaged in an illegal activity in denying the jury access to all evidence in the case.

While it may be within the realm of fair comment for the prosecutor to attempt to address points raised by the defendant's counsel in closing argument, to allow a personal attack upon the veracity of counsel for the defendant is extremely prejudicial in that it focuses the attention of the jury away from the facts in dispute onto the personality and reputation of counsel.

(6) The basis of this Petition for Writ of Certioari is that the decision of the Court of Criminal

Appeals failed to adequately address the issue of whether or not the State prosecutor committed reversible error when he tried to impeach the defendant for an offense for which he was not convicted.

The Court of Criminal Appeals used the Harmless Error Rule in upholding this reversible error. But, how can the error be harmless when the defendant testified for the mitigating circumstances of remorse and repentance of his previous life of crime. Although it may be proper for the prosecution to cross examine the defendant regarding prior criminal convictions, it is extremely prejudicial to the appellant's argument for the prosecution to address possible criminal activity that has never been

proven and of which the appellant has never been arrested.

(7) The basis of this Petition for Writ of Certiorari is that the decision of the Court of Criminal Appeals failed to adequately address the issue of whether or not there was insufficient evidence adduced at trial to sustain a conviction as well as a failure of the State to carry the burden of proof with regard to the offense of capital murder: therefore, it was reversible error for the trial court to deny the defense motion for a judgment of acquittal at the conclusion of the trial.

The decision of the Court of Criminal Appeals hinges only on the allowability of circumstantial evidence. The court totally fails to

acknowledge the dying declaration of the only eyewitness to the offense. The court does cover in its statement of the facts when it states on page seven:

> "The only evidence presented by the defense was in the form of testimony from Jessie Portis. Mr. Portis testified that he arrived at Bailey's store after Mr. Bailey and Mr. Pickens were shot. He leaned down and asked Mr. Pickens if he could say what color vehicle the robbers were in. According to Mr. Portis, Mr. Pickens responded that the robbers were in a red vehicle. when asked if the robbers were white or black, Mr. Pickens stated, 'white.'"

(8) The basis of this Petition for Writ of Certiorari is that the decision of the Court of Criminal Appeals failed to adequately address the issue of whether or not the death penalty imposed by the trial court judge in this cause should be reversed.

There is absolutely no justification stated in the August 3, 1990, decision of the Alabama Court of Criminal Appeals which would provide any facts to the trial court that were not known to the trial jury that would justify the reversal by the trial jury when it imposed life without parole in this case.

(9) The basis of this Petition for Writ of Certiorari is that the decision of the Alabama Court of Criminal Appeals failed to adequately address the issue of whether or not death by electrocution as applied by the State of Alabama constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States

of America and Article 1, Section 15 of the Constitution of the State of Alabama.

In light of recent developments concerning the reconditioning of the Alabama electric chair as a result of the necessity of using repeated shocks to bring about the death of the condemned individual which has been widely reported in the press, the court should take judicial knowledge thereof.

(10) In light of the recent study of the United States General Accounting Office, the Alabama Supreme Court should consider the issue of whether or not the application of the death penalty is discriminatory in nature, and, therefore, violative of the Fourth, Fifth, Sixth, Eighth and

Fourteenth Amendments of the United States Constitution of America and the appropriate provisions of the Alabama Constitution (1901). A copy of this United States General Accounting Office report is annexed and marked as Exhibit "B" to this Petition for Writ of Certiorari. Because of this recently discovered evidence, your Petitioner is presenting this issue in this Petition for Writ of Certiorari and will file a supplemental brief with reference to this issue.

WHEREFORE, your Petitioner respectfully requests that after preliminary examination, this Writ of Certiorari be granted and that this Honorable Court proceed under its rules to review this matter complained of, and to reverse the judgment of the

Alabama Court of Criminal Appeals, and for such other relief as your Petitioner may be entitled.

Submitted in support thereof is the Brief with Argument of your Petitioner.

Respectfully submitted,

_____

Blanchard L. McLeod
Of Counsel for Appellant

CERTIFICATE OF SERVICE

I do hereby certify that I have this 5th day of October, 1990, served a copy of this Petition for Writ of Certiorari and Brief on the Alabama Court of Criminal Appeals and the Attorney General of Alabama by mailing the same by United States Mail, properly addressed, with first class postage prepaid.

_____

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STATE OF ALABAMA JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

* * * * * * * * * * *

VICTOR R. STEPHENS,	*	
	*	
Appellant,	*	
	*	
vs.	*	SC Case No.
	*	91-66
THE STATE OF ALABAMA,	*	
	*	
Appellee.	*	

On Appeal from the Circuit Court
of Hale County, Alabama
Hon. Charles A. Thigpen, Judge

PETITION FOR WRIT OF CERTIORARI AND BRIEF OF APPELLANT, VICTOR R. STEPHENS

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STATEMENT OF THE CASE

On or about December 14, 1987, Victor Ramar Stephens was tried before the Circuit court of Hale County, Alabama on a two count indictment. In the indictment returned by the March 24, 1986 Session of the Grand Jury for Hale County, Alabama, Mr. Stephens was charged in count one with intentionally causing the death of Adam Pickens by shooting him with a pistol during the course of committing a theft of lawful money of the United States of America. The second count of the indictment charged Mr. Stephens with intentionally causing the death of James R. Bailey during the commission of a theft of lawful money of the United States of America. Mr. Victor Ramar Stephens was

convicted on both counts of the above said indictment and sentenced to death. It is from this conviction and sentence that the defendant appeals.

STATEMENT OF THE FACTS

On or about January 20, 1986, a robbery took place in Hale County, Alabama at Bailey's Grocery Store located on Highway 14, (R-167). During this robbery two men, Mr. James R. Bailey, age 72 and Mr. Adam Pickens, age 82, were killed, (R-166).

On January 21, 1986, Charles S. Stone of the Georgia Bureau of Investigation, Dennis Holloway of the Carroll County, Georgia Sheriff;s Department, Chief Deputy A.S. Manley of the Randolph County, Alabama, Sheriff's Department and A.B.I. Agent Ed Trayler interviewed Mr. Victor Ramar Stephens at the Carroll County Hospital, in Carroll County, Georgia, where he was being treated for a gunshot wound to

his left hand, (R.-39). During the course of this interview, Mr. Stephens stated to these representatives of law enforcement from the States of Georgia and Alabama that he had been shot the previous day at approximately 6:00 p.m. by an individual named Dennis Johns. At that time, the interview was terminated, (R-39, 40). Mr. Stephens was taken into custody for suspicion of involvement in two robberies, one occurring in Carroll County, Georgia, and the other occurring in Randolph County, Alabama, (R-59). Subsequent interviews with Mr. Stephens were held at the request of Mr. Stone and Mr. Trayler at the Carroll County Jail on the days of January 23rd and January 25, 1986, (R-27). During the course of the interview that took place on

January 23, 1986, Mr. Stone stated that he did not recall whether or not Mr. Stephens had requested Mr. Stone to aid him in getting some relief for the pain he was feeling in his injured hand in exchange for a statement concerning the offenses with which he was charged, (R-41).

As a result of the statements acquired from Mr. Stephens by Officer Stone and Trayler, Mr. Stephens was extradicted to Hale County, Alabama and was subsequently indicted for the capital murders of Mr. James R. Bailey and Mr. Adam Pickens.

The following is the transcription of the Batson motion, argument of counsel and the justification to the

Court for the strikes of the black venire persons:

> "MR. MORRIS: Judge, I would offer to the Court, a brief, or would bring to the Court's attention, a motion previously filed. The Court is aware of Batson Motion, and making it known to the Court that the basis of the Batson Motion is that of the 22 jurors struck, which is not including the alternate, the first 21 were black. The other juror that was struck by the State was juror number 22, which was their last strike and they struck number 106, which was Mr. Wyatt. (emphasis added). We feel like under the language, that it's clear that through the process of jury striking, that they have systematically excluded members of the black race. Further, for the record, my client (R-386) is black and we feel like that is a violation of the Batson case.
>
> THE COURT: What is the composition of the venire total?
>
> MR GREENE: As I understand it, it's seven white, five black.
>
> THE COURT: The jury as struck is seven white and five black.

MR. GREENE: I think so.

THE COURT: What is the composition of the venire as a whole?

MR. GREENE: We've got it right here. Mr. Corley, number 17 is a white male. Mrs. Ferguson is a white female. Ms. Fondren, number 29, is a white female. Mr. Brenstead, is a white male, Lyles is a black female, Marks is a black female, 82 is a black male, 92, Travis, is a black female, 94, Tucker, is a white female, and 96 is Beth Williams, and that's a white female, and 101 is Willie Williams, a black female, and the alternates are Michael G. Harris, number 38, a white male, and Mr. Tubbs, number 93, white male.

THE COURT: Who's the last juror struck?

MR. GREENE: Number 106, Mr. Wyatt.

THE COURT: Last juror? The last juror, number 38, (R-387) that was the last person struck, period, was number 38, Michael G. Harris, by the State; is that correct?

MR. MORRIS: That's true, as an alternate.

THE COURT: All right. The composition of this jury is seven and five. Now depending on the alternatives, it could be eight and four.

MR. GREENE: Eight and five if you keep the alternate.

THE COURT: All right. You've made a prima facie showing, justify your strikes. (emphasis added).

MR. GREENE: First of all, we did not attempt to strike jurors solely because of their race. We did, however, strike jurors for reasons for reasons I would like to state in the record at this time. I'll try to take them in order and state those reasons as best I can.

We struck juror number 68, Mr. Mickens, his position on capital punishment, which, I think is already of record.

We struck juror number 4, Mrs. Ball, on her position on capital punishment.

We struck juror number 5, who's also a Ball, as I understand it. Mr. Ball, the information was that he had answered affirmatively on drugs, that is, that he, or some member of his family or (R-388)

some personal friend being so involved. The information also received was that he was some sort of part-time preacher and that his son had been in some serious trouble dealing with drugs and/or criminal activity. That was from law enforcement investigation. Finally, he indicated he did not want to serve and would ask to be let off, as we understood it. Now number 76 was our next strike, and that was Mr. Patton, who had answered affirmatively on our question concerning previous knowledge or association of any type of criminal offense. Our office had prosecuted him for night hunting. We seized his weapons and sold them and he had also been convicted of a DUI on other occasions.

Number 47 was a Margaret Hood, and we struck her because she asked off and had quite a bit to say about lack of transportation and inability to get here and she was concerned and wouldn't be able to pay attention, etc. Finally, it seems as if she and her husband have a history or problem in the child support court. Her husband actually being prosecuted and even done some time in the jail with reference to that. Of course, our office handles the child support program. Now that was in Perry County, there was (R-389) some type of connection, a cousin or something. That's the reason we're so familiar with them.

Number 46 was a Mattie Hollifield. We struck her because she had been arrested and charged with worthless checks and similar type offenses on several different occasions.

We struck juror number 36, which was Carolyn Harris. The information gathered during voir dire was that she was young, single and unemployed and our information in our investigation prior to that was that her brother is a defendant or has been a defendant in a criminal case which is being prosecuted.

We struck juror number 87, Vinie P. Spence. The information was that her sons had been in some very serious criminal offenses. We just felt like she would not be a good State's juror in this case.

We struck juror number 49, Dorothy Johnson. Information from investigation was that she had been a defendant in small claims court and been served with numerous civil suits. She was not particularly well thought of and recommended to us as a juror to strike. In voir dire, she seemed to be extremely responsive to the Defendant's questions. I noticed that she was (R-390) chewing gum and not particularly concerned about this and felt like she would not be a proper juror to serve on this jury.

Number 18 was our 10th strike, Betty Cottrell. She asked off this jury. She did not want to serve and she answered our questions with reference to involvement and knowledge of criminal activity in the affirmative. She indicated that she or someone very close to her had been charged with some criminal offense.

Our next strike was number 80, Willie Pratcher. This is the juror who indicated that he lived in Atlanta and seemed to be interested in not serving. He was wearing sunglasses and that to me has always been a point. When I find jurors doing that, unless there's a real good reason for it, generally, they do not tend to make very good State jurors. He's the only one in that position. He also was sitting next to a Mr. Gray. Defense counsel brought to the Court's attention, of course, our attention at the same time, that Mr. Gray, a juror struck for his feelings on capital punishment, had approached defense counsel discussing or talking or making some comments about burning the guy or something of that nature and Mr. Pratcher seemed to have (R-391) some type of relationship with him. I felt uncomfortable leaving him on the jury knowing the propensity of the Juror Gray to verbalize his position.

Number 59 was struck as our 12th strike. That's Miss Gracie M. Lewis. Our information is that she was single

and unemployed. Also, our investigative information indicated that her son had been involved in a death or a killing. Information was not clear as to whether it was some type of automobile accident or whether it was some criminal charge, but in any event, her son was involved in it in some manner and we felt like she could not stay on as a juror.

Our 13th strike was number 85, Willie Shelton. I think it's Shelton. This juror, in the course of individual voir dire, is from the community and, of course, was listed here, her marital status here, as separated. She was very insistent on that. She reported that she lives in this particular community and never heard anything about this case whatsoever. We find that extremely strange and based on that, felt like she should not remain as a juror in this case.

Number 97, Essie Lee Williams, on individual (R-392) voir dire, she seemed to be familiar with the case which, being from the general area of this offense, that would seem to be a plus, but her individual voir dire, she seemed to be very concerned and communicated to us that she was well aware of the fact that one of the men had lived to tell all about it and she was waiting very much to hear that. Seemed to be very concerned about that. Of course, we're very familiar with the evidence in this case where

there is a proposed dying declaration from the deceased, "Pop," indicating some words to the effect that some two white men did it. We felt that leaving her on the jury with anticipation of testimony would certainly be detrimental to us.

Our 15th strike was 102, Bertha L. Wilson. Sheriff's Office recommended this juror be struck. The Sheriff himself indicated he had known her for quite a long time and felt that she was extremely anti-establishment. That her mother was considered by him to be a person he though well of, but he was concerned with Mrs. Wilson. He believed that her husband had been previously in some type criminal trouble. We felt that during the voir dire, she seemed to (R-393) be very unconcerned about this very serious matter that she was about. We struck her on that basis.

Our 16th strike was number 35, Annie Harris. She had reported from her information as being single, unemployed and relatively young. The note I made was that she knew nothing about the case.

Our 17th strike was number 98, and that was Kenneth L. Williams. Observations by our group in observing the jurors was that this man was once again, seemed to be involved with the juror, Mr. Gray. He seemed to be associating

with him. His general appearance was very rough and we simply felt like the combination of the two justified and required us to remove him from the jury panel.

Our 18th strike was number 9, Ruby Lee Brown. Now she, according to our information, had had a husband who had been killed in a homicide. That seemed to be a plus. Sheriff's Office was very concerned that she was extremely negative about that particular case and we felt that leaving her as a juror would not be wise under these circumstances. She was not happy or pleased with the situation, that we should remove (R-394) her, so we did.

Juror number 40, Mrs. Hayes, Lelia Hayes, getting to the point where some of these jurors had some pluses. We were concerned about keeping her. Mrs. Hayes worked with Mrs. Bailey at the nursing home. However, the reaction during individual voir dire concerning that, she seemed to be totally removed from that situation and totally unconcerned about it and based on that, we felt there might be some animosity or something we didn't realize with Mrs. Hayes. We struck her on that basis.

Number 43, Mrs. Hobson, was our next strike and this was a juror we had decided that we would leave on the jury or keep on the jury, but we felt that

she was all right, from our standpoint. However, our information was that she was requesting to get off the jury and had requested to get off the jury. She had had an invalid husband and the storm last night essentially damaged their house. So we went ahead and removed her for those reasons. Otherwise, we would have kept her.

Our 21st strike was number 59 -- 39, Sarah Harris. The information reported was that she had kinspeople who had been in criminal trouble and though (R-395) we had otherwise felt that she was all right, that information caused us to remove her.

Juror number 106 was Mr. Wyatt, who had indicated he had been in criminal trouble and had been prosecuted at some point in time, though he was extremely positive in his individual voir dire, that information, we felt, required that he be removed.

MR. JOHNSON: He was a white male.

MR. GREENE: And juror number 38, was Mr. Michael Harris, who indicated that he had a cousin at some point in time, 15 years ago, that had been involved in some type of criminal activity and we struck him on that basis.

THE COURT: Is that all?

MR. GREENE: That concludes all our strikes. We would like to mention

for the record that the defense strikes were of all white males or females, for whatever benefit that is.

THE COURT: Cross examination.

MR. MORRIS: Judge, I'm not sure that I have any cross. I would make it known for the record on I think there were three people that they mentioned and that was Mr. Williams, Mr. Pratcher and a Mr. Pratcher. Mr. Kenneth Williams and Mr. Willie Pratcher and one other individual (R-396) that I believe the District Attorney eluded to as sitting near or being around Mr. Gray. I would make it known to the Court, I believe the Court would recall that during yesterday's continuous voir dire that lasted into the night, Mr. Gray was an occupant on the front row with a Mr. Corley sitting on one side and a Mr. Collins sitting on the other. Both of whom were white. To my knowledge, there was not another black individual on the front row yesterday. So I would differ with the information of the State in that regard.

Now the information that the District Attorney has concerning things like they had some relatives involved in some crimes, being in small claims court where they've been sued, matters like this, in light of the -- the fact athat the State said they didn't respond to any questions or didn't seem to know anything about it, we contend that the jurors by comparison that were left on

this case knew nothing about it. Starting with Mr. Grinstead, Mrs. Fondren, Mr. Corey, also responded that they knew nothing about it. She was left. A black female. Now Mrs. Marks responded that she knew something about it. She was left. A black female. Now Mrs. Marks responded that she knew (R-397) something about it, a black female. A Mr. Ryans responded that he knew something about it, a black male. A Mrs. Travis responded that she knew something about it, a black female. Mrs. Williams responded that she knew something about it, a black female, and our contention is that it's clear that the fact that someone knows nothing about it played no part and we contend that it was strickly on the basis of race in this matter.

As to Mrs. Ruby Lee Brown, she stated in voir dire that her husband was a victim of a homicide and that the victim was prosecuted and there would be not other -- I believe she also responded -- I believe she had bumper sticker -- I take that back, Your Honor. That's not true. I'm saying that there would be no reason in the world that I can think of why she would not be an excellent juror other than race. She was struck.

Further, we contend that the last four strikes that they enumerated, starting with Mrs. Brown, are very vague and very indecisive answers. For instance,

Mrs. Hayes, number 19 strike, number 40 on the venire list, stated that she knew Mrs. Bailey and that she knew her and knew her (R-398) daughter and had an association with Mrs. Bailey who's in the nursing home where she's employed as well as knew her daughter well. No conceivable reason that she would not make an excellent juror for the State, other than the fact that she's black.

Now there's vague allegations on number 43, they say that her husband had been in some sort of problem. Mrs. Hobson, we contend that's just a smoke screen there. And then one of the persons up here, he had some sunglasses on. The defense contends certainly that is no justifiable reason. Now that's all I have.

MR. GREENE: Our only response is that one of the first things as to Mr. Gray, it was reported to us and made quite some concern as to Mr. Gray this morning concerning who he might talk to. Now this is the information we got from the people we asked to try to pay attention. Now Mr. Williams, Gray, Patton and Pratcher, were sitting together this morning in the back of the courtroom. We felt that that might be a matter of concern. We point out for the record that the last, I think, five strikes, for the State involved two white males we thought we (R-399) had some problems with and three black

females that we were concerned about. We also thought these three black females might make us good jurors, but we had reason, we felt, overrode our desires to retain them.

I think that's all.

THE COURT: Is it your testimony as an officer of this Court that the reasons for striking were nonracial and not based upon the race of any particular juror?

MR. GREENE: It is, Your Honor. I think the jurors we have before us bears that out. There's black males serving, some five blacks in total. We have an abundance of females on this jury in a capital murder case. I think we've got a jury that well reflects, based upon peoples backgrounds, Your Honor, and on that basis, a fair racial mixture of males and females, black and white, in this community. We arrived at this through exhaustive and argumentative process.

At Mr. Stephens trial which began December 14, 1987, the Hon. Larry W. Morris, trial counsel for Mr. Stephens, raised an objection to the fact that of the 22 jurors struck by the State, the first 21 were black, (R-386).

During the closing arguments of the State, Mr. Ed Greene, Chief Deputy District Attorney, made an allegation to the jury that Mr. Morris was attempting to cover up all the evidence, a direct and personal attack on the character of a fellow-attorney, Mr. Morris, (R-814). Although Mr. Morris objected to this comment, the Court overruled his objection and allowed Mr. Greene to continue with his attack, (ibid.).

During the penalty phase of Mr. Stephens' trial the court allowed the State of Alabama in the person of Mr. Greene, to elicit testimony concerning a crime alleged to have been committed by Mr. Stephens in Carrollton, Georgia, although Mr. Stephens had never been convicted of the offense, (R-870, 871).

At the appellant's sentencing trial, the State's prosecutor specifically stated that there were only two aggravating circumstances that they intended for the jury to consider, (R-858). The first aggravating circumstance was the alleged event that was the basis of the trial. The second alleged aggravating circumstance had occurred 11 days before this alleged event, (R-865). The trial court specifically charged the jury that there were only two aggravating circumstances for them to consider, (R-883).

The trial jury deliberated the issue of whether life without parole or the death penalty was the appropriate penalty to impose in this case. After deliberation, the trial jury, by a

seven (58%) to five (42%) vote, determined that life without parole was the appropriate sentence to be imposed in this case, (R-906). Yet, the trial court, without justifiable causes stated, refused to give any credence to any of the mitigating issues presented by the Defense counsel before the advisory jury and sentenced the appellant to death.

The appellant was convicted of capital murder on December 17, 1987, (R-183), and sentenced to death on July 24, 1989, (R-908, et seq.).

I.

WHETHER OR NOT THE PROSECUTION PERFORMED MISCONDUCT UNDER THE PRINCIPLES SET FORTH IN EX PARTE BRANCH, 526 So.2d 609 (Ala. 1987) AND BATSON V. KENTUCKY, 476 U.S. 79, 106 S.Ct. 1712, 90 L.ED. 69 (1986), WHERE THE PROSECUTION USED 21 OF ITS 22 PEREMPTORY STRIKES (95.45%) TO STRIKE BLACKS FROM THE JURY VENIRE.

II.

WHETHER OR NOT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT"S MOTION FOR MISTRIAL BASED UPON PROSECUTOR'S COMMENT DURING CLOSING ARGUMENTS THAT THE ATTORNEY FOR THE DEFENDANT WAS ATTEMPTING TO HIDE EVIDENCE FROM THE JURY SINCE SUCH STATEMENT WAS INERADICABLY PREJUDICIAL AND IMPARTED TO THE JURY THE IMPRESSION THAT THE DEFENSE COUNSEL WAS ENGAGED IN AN ILLEGAL ACTIVITY IN DENYING THE JURY ACCESS TO ALL EVIDENCE IN THE CASE.

III.

WHETHER OR NOT THE STATE PROSECUTOR COMMITTED REVERSIBLE ERROR WHEN HE TRIED TO IMPEACH THE DEFENDANT FOR AN OFFENSE FOR WHICH HE WAS NOT CONVICTED.

IV.

WHETHER OR NOT THERE WAS INSUFFICIENT EVIDENCE ADDUCED AT TRIAL TO SUSTAIN A CONVICTION AS WELL AS A FAILURE OF THE STATE TO CARRY THE BURDEN OF PROOF WITH REGARD TO THE OFFENSE OF CAPITAL MURDER: THEREFORE, IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO DENY THE DEFENSE MOTION FOR A DIRECTED VERDICT OF ACQUITTAL AT THE CONCLUSION OF THE STATE'S CASE, AS WELL THE DEFENSE MOTION FOR A JUDGMENT OF ACQUITTAL AT THE CONCLUSION OF THE TRIAL.

V.

WHETHER OR NOT THE DEATH PENALTY IMPOSED BY THE TRIAL COURT JUDGE IN THIS CAUSE SHOULD BE REVERSED.

VI.

WHETHER OR NOT DEATH BY ELECTROCUTION AS APPLIED BY THE STATE OF ALABAMA CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHT AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND ARTICLE 1, SECTION 15 OF THE CONSTITUTION OF THE STATE OF ALABAMA.

I.

THE PROSECUTION PERFORMED MISCONDUCT UNDER THE PRINCIPLES SET FORTH IN EX PARTE BRANCH, 526 So.2d 609 (Ala. 1987) AND BATSON V. KENTUCKY, 476 U.S. 79, 106 S.Ct. 1712, 90 L.ED. 69 (1986), WHERE THE PROSECUTION USED 21 OF ITS 22 PEREMPTORY STRIKES (95.45%) TO STRIKE BLACKS FROM THE JURY VENIRE.

This Honorable Court is bound by Batson, supra, and Branch, supra, in consideration of this issue. In Branch, supra, the Alabama Supreme Court set forth the guidelines to be followed in this state in implementing the United States Supreme Court's decision in Batson, supra. These guidelines are as follows:

"In Ex parte Branch, 526 So.2d 609 (Ala. 1987), the Alabama Supreme Court expounded on the relevant circumstances which a defendant could submit as leading to an inference of discrimination. Such evidence includes:

1. Evidence that the jurors in question share[d] only this one

characteristic - their membership in the group - and that in all other respects they [were] as heterogeneous as the community as a whole. [People v.] Wheeler, 22 Cal.3d [258] at 280, 583 P.2d at [748] 764, 148 Cal.Rptr. [890] at 905 [1978]. For instance, it may be significant that the person challenged, although all black, include both men and women and are a variety of ages, occupations, and social or economic conditions, Wheeler, 22 Cal.3d at 280, 583 P.2d at 764, 148 Cal.Rptr. at 905, n. 27, indicating that race was the deciding factor.

2. A pattern of strikes against black jurors on the particular venire; e.g., 4 of 6 peremptory challenges were used to strike black jurors. Batson, 476 U.S. at 97, 106 S.Ct. at 1723.

3. The past conduct of the State's attorney in using peremptory challenges to strike all blacks from the jury venire. Swain [v. Alabama], [380 U.S. 202 at 224, 85 S.Ct. 824 at 838, 13 L.Ed.2d 759 (1965)].

4. The type and manner of the State's attorney's questions and statements during voir dire, including nothing more than desultory voir dire. Batson, 476 U.S. at 97, 106 S.Ct. at 1723; Wheeler, 22 Cal.3d at 281, 583 P.2d at 764, 148 Cal.Rptr. at 905.

5. The type and manner of questions directed to the challenged juror, including a lack of questions, or a lack of meaningful questions. Slappy v. State, 503 So.2d 350, 355 (Fla.Dist.Ct.App. 1987); People v.

Turner, 42 Cal.3d 711, 726 P.2d 102, 230 Cal.Rptr. 656 (1986); People v. Wheeler, 22 Cal.3d 258, 583 P.2d 748, 764, 148 Cal.Rptr. 890 (1978).

6. Disparate treatment of members of the jury venire with the same characteristics, or who answer a question in the same or similar manner; e.g., in Slappy, a black elementary school teacher was not challenged. Slappy, 503 So.2d at 352 and 355.

7. Disparate examination of members of the venire; e.g., in Slappy, a question designed to provoke a certain response that is likely to disqualify a juror was asked to black jurors, but not to white jurors. Slappy, 503 So.2d at 355.

8. Circumstantial evidence of intent may be proven by disparate impact where all or most of the challenges were used to strike blacks from the jury. Batson, 476 U.S. at 93, 106 S.Ct. at 1721; Washington v. Davis, 426 U.S. [229] at 242, 96 S.Ct. [2040] at 2049 [48 L.Ed.2d 597 (1976)].

9. The State used peremptory challenges to dismiss all or most black jurors. See Slappy, 503 So.2d at 354, Turner, supra."

Robinson v. State, 545 So.2d 828

(Ala.Cr.App. 1989) at pages 832, 833.

This trial was before the Hon.

Charles A. Thigpen, Presiding Judge of

the Fourth Judicial Circuit. The State's attorney and the Defense's attorney were allowed to conduct voir dire. Judge Thigpen, within reason, allowed both sides to conduct as exhaustive a voir dire as they chose to conduct.

In applying the facts in this case, it becomes obviously clear that the appellant has established a prima facie case of discrimination. First, the appellant is black, (R-387). The State had 22 peremptory strikes. The State used its first 21 peremptory strikes (95.45%) to strike blacks from the venire, (R-386). The last State's strike was white, (R-387). Otherwise, the State would have struck 100% black.

Having a prima facie showing of discrimination, the State was ordered to justify their strikes, (R-388). The State's grounds were as follows:

Juror Number 68: His position on capital punishment, (R-388);

Juror Number 4: Her position on capital punishment, (R-388);

Juror Number 5: That he, or some member of his family or (R-388) some personal friend being so involved. The information also received was that he was some sort of part-time preacher and that his son had been in some serious trouble dealing with drugs and/or criminal activity. That was from law enforcement investigation, (R-388, 389);

Juror Number 76: Answered affirmatively on our question concerning previous knowledge or association of any type of criminal offense. Our office had prosecuted him for night hunting. We seized his weapons and sold them and he had also been convicted of a DUI on other occasions, (R-389);

Juror Number 47: She asked off and had quite a bit to say about lack of transportation and inability to get here and she was concerned and wouldn't be able to pay attention, etc. Finally, it seems as if she and her husband have a history or problem in the child support court. Her husband actually being prosecuted and even done some time in the jail with reference to that. Of course, our office handles

the child support program. Now that was in Perry County, there was some type of connection, a cousin or something. That's the reason we're so familiar with them, (R-389, 390);

Juror Number 46: She had been arrested and charged with worthless checks and similar type offenses on several different occasions, (R-390);

Juror Number 36: She was young, single and unemployed and our information in our investigation prior to that was that her brother is a defendant or has been a defendant in a criminal case which is being prosecuted, (R-390);

Juror Number 87: The information was that her sons had been in some very

serious criminal offenses. We just felt like she would not be a good State's juror in this case, (R-390);

Juror Number 49: Information from investigation was that she had been a defendant in small claims court and been served with numerous civil suits. She was not particularly well thought of and recommended to us as a juror to strike. In voir dire, she seemed to be extremely responsive to the Defendant's questions. I noticed that she was chewing gum and not particularly concerned about this and felt like she would not be a proper juror to serve on this jury, (R-390, 391);

Juror Number 18: She asked off this jury. She did not want to serve and she answered our questions with

reference to involvement and knowledge of criminal activity in the affirmative. She indicated that she or someone very close to her had been charged with some criminal offense, (R-391);

Juror Number 80: Juror indicated that he lived in Atlanta and seemed to be interested in not serving. He was wearing sunglasses and that to me has always been a point. When I find jurors doing that, unless there's a real good reason for it, generally, they do not tend to make very good State jurors. He's the only one in that position. He also was sitting next to a Mr. Gray. Defense counsel brought to the Court's attention, of course, our attention at the same time, that Mr. Gray, a juror struck for his

feelings on capital punishment, had approached defense counsel discussing or talking or making some comments about burning the guy or something of that nature and Mr. Pratcher seemed to have some type of relationship with him. I felt uncomfortable leaving him on the jury knowing the propensity of the Juror Gray to verbalize his position, (R-391, 392);

Juror Number 59: Our information is that she was single and unemployed. Also, our investigative information indicated that her son had been involved in a death or a killing. Information was not clear as to whether it was some type of automobile accident or whether it was some criminal charge,

but in any event, her son was involved in it in some manner and we felt like she could not stay on as a juror, (R-392);

Juror Number 85: This juror, in the course of individual voir dire, is from the community and, of course, was listed here, her marital status here, as separated. She was very insistent on that. She reported that she lives in this particular community and never heard anything about this case whatsoever. We find that extremely strange and based on that, felt like she should not remain as a juror in this case, (R-392);

Juror Number 97: She seemed to be familiar with the case which, being from the general area of this offense, that would seem to be a plus, but her

individual voir dire, she seemed to be very concerned and communicated to us that she was well aware of the fact that one of the men had lived to tell all about it and she was waiting very much to hear that. Seemed to be very concerned about that. Of course, we're very familiar with the evidence in this case where there is a proposed dying declaration from the deceased, "Pop", indicating some words to the effect that some two white men did it. We felt that leaving her on the jury with anticipation of testimony would certainly be detrimental to us, (R-392, 393);

Juror Number 102: Sheriff's Office recommended this juror be struck. The Sheriff himself indicated he had known her for quite a long time

and felt that she was extremely anti-establishment. That her mother was considered by him to be a person he thought well of, but he was concerned with Mrs. Wilson. He believed that her husband had been previously in some type criminal trouble. We felt that during the voir dire, she seemed to be very unconcerned about this very serious matter that she was about. We struck her on that basis, (R-393, 394);

Juror Number 35: She had reported from her information as being single, unemployed and relatively young. The note I made was that she knew nothing about the case, (R-394);

Juror Number 98: Observations by our group in observing the jurors was that this man was once again, seemed to be involved with the juror, Mr. Gray.

He seemed to be associating with him. His general appearance was very rough and we simply felt like the combination of the two justified and required us to remove him from the jury panel, (R-394);

Juror Number 9: She, according to our information, had had a husband who had been killed a homicide. That seemed to be a plus. Sheriff's Office was very concerned that she was extremely negative about that particular case and we felt that leaving her as a juror would not be wise under these circumstances. She was not happy or pleased with the situation, that we should remove her, so we did, (R-394, 395);

Juror Number 40: We were concerned about keeping her. Mrs. Hayes worked with Mrs. Bailey at the

nursing home. However, the reaction during individual voir dire concerning that, she seemed to be totally removed from that situation and totally unconcerned about it and based on that, we felt there might be some animosity or something we didn't realize with Mrs. Hayes. We struck her on that basis, (R-395);

Juror Number 43: This was a juror we had decided that we would leave on the jury or keep on the jury, but we felt that she was all right, from our standpoint. However, our information was that she was requesting to get off the jury and had requested to get off the jury. She had had an invalid husband and the storm last night essentially damaged their house. So we

went ahead and removed her for those reasons. Otherwise, we would have kept her, (R-395);

Juror Number 39: The information reported was that she had kinspeople who had been in criminal trouble and though we had otherwise felt that she was all right, that information caused use to remove her, (R-395, 396);

Juror Number 38: Indicated that he had a cousin at some point in time, 15 years ago, that had been involved in some type of criminal activity and we struck him on that basis, (R-396).

The justification for the State's strikes ranges from the ridiculous (chewing gum, (R-390, 391), to the sublime (wearing sunglasses, R-391). However, in all instances where the State indicated that it might have some

information that was gained by investigation prior to voir dire, the State never tried to investigate this information in any manner during voir dire. As the court stated in Avery v. State, 545 So.2d 123 (Ala.Cr.App. 1988), "[t]he prosecutor could have resolved her suspicions on voir dire, but she did not do so," at page 127.

"A prosecutor's failure to engage black prospective jurors, 'in more than desultory voir dire, or indeed to ask them any questions at all, before striking them peremptorily, is one factor supporting an inference that the challenge is based on groups bias.'" People v. Turner, 42 Cal.3d 711, 726 P.2d 102, 230 Cal.Rptr. 656 (1986). Cited in Avery, supra, at page 127. As

the court affirmed in Madison v. State, 545 So.2d 94 (Ala.Cr.App. 1987) at page 99, "[a]s noted in Ex parte Branch, 526 So.2d 609 (Ala. 1987), the absence of voir dire questions directed to the challenged jurors must be weighed against the prosecution." The prosecutor, in this instant case, had the right of almost unlimited voir dire (within reason) to either confirm or deny his suspicions. But, he never chose to do so. Therefore, one must assume the systematic group exclusion of blacks. The very thing Batson sought to protect.

Additionally, the State justifies its strikes with reference to chewing gum, (R-390, 391), and wearing sunglasses, (R-391), upon its

intuition. "Furthermore, intuitive judgment or suspicion by the prosecutor is insufficient to rebut the presumption of discrimination." Branch, supra, at page 623 citing Batson, supra, at page 1723.

Sections 1, 6 and 22, Ala. Const. 1901, combine to guarantee Equal Protection of the law, Branch, supra, at page 619. "The Equal Protection Clause (Amend. 14 U.S. Const.) guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race," Batson, supra, at page 1717.

Because the State's prosecutor in this case systematically discriminated against the appellant in the denial of his Equal Protection rights under the

Alabama Constitution and the United States Constitution before the first witness ever testified, the appellant's conviction must be reversed and this case remanded for a trial consistent with the Batson and Branch decisions.

II.

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR MISTRIAL BASED UPON PROSECUTOR'S COMMENT DURING CLOSING ARGUMENTS THAT THE ATTORNEY FOR THE DEFENDANT WAS ATTEMPTING TO HIDE EVIDENCE FROM THE JURY SINCE SUCH STATEMENT WAS INERADICABLY PREJUDICIAL AND IMPARTED TO THE JURY THE IMPRESSION THAT THE DEFENSE COUNSEL WAS ENGAGED IN AN ILLEGAL ACTIVITY IN DENYING THE JURY ACCESS TO ALL EVIDENCE IN THE CASE.

Although counsel for both the Defendant and the State are allowed wide latitude in drawing reasonable inferences from the evidence within the context of their closing arguments,

Sanders v. State, 426 So.2d 497 (Ala.Cr.App. 1982), however, counsel may not make prejudicial remarks on matters of which no evidence has been presented. Hammins v. State, 439 So.2d 809, (Ala.Cr.App. 1983). During the course of the trial of the appellant, Victor R. Stephens, no evidence was presented by the State that would raise even an inference that Mr. Morris, the counsel for the Defense, was attempting to cover up evidence as alleged by the prosecutor. This allegation could only give rise to an ineradicable prejudice in the minds of the jury that the Defense attorney was engaged in illegal activity.

NOW THEREFORE, the appellant would request that this Court would set aside his conviction or in the alternative,

remand this case to the trial court with instructions to grant the defense motion for mistrial.

III.

THE STATE PROSECUTOR COMMITTED REVERSIBLE ERROR WHEN HE TRIED TO IMPEACH THE DEFENDANT FOR AN OFFENSE FOR WHICH HE WAS NOT CONVICTED.

Section 12-21-162, Code of Alabama (1975), is very clear that a witness may be impeached for crimes involving moral turpidtude. Professor Gamble in Section 145, McElroy's Alabama Evidence, 3rd Edition, does an excellent job of outlining the topic of moral turpitude and covers the topic in 145.01(15) as to the manner of eliciting the witness'; conviction.

At the time of trial of the appellant's case, the very learned State's prosecutor asked the appellant:

> "Q. I see. You know a Mr. Saxon?
>
> A. Yes.
>
> Q. Do you have anything to do with a robbery of his place of business there in Carrollton, Georgia?
>
> A. No, sir.
>
> Q. You deny that?
>
> A. Yes, sir. Because Mr. Saxon knows me personally." (R-870).

The appellant's trial attorney immediately moved for a mistrial, (R-870, 871), citing the well-settled laws in this area of how to correctly question a witness regarding moral turpitude. This motion for a mistrial was denied, (R-871).

It is well-settled law how this question should be asked by the State's prosecutor and the learned prosecutor obviously knew better.

The learned State's prosecutor in this case has more than 15 years as a prosecutor and has achieved the position of Chief Assistant District Attorney. Obviously, he knew how to properly impeach a witness. However, having been caught in the commission of committing reversible error, he then attempted to extricate himself, alleging that the Defense had opened the door for such a question, (R-871). Obviously, this explanation was only a most feeble attempt, at best, to justify the commission of reversible

error. This supposedly justification is not justifiable under any set of applicable code or case law.

Based upon the cases of Dean v. Johnson, 206 So.2d 610 (Ala. 1968) and Parker v. State, 198 So.2d 261 (Ala. 1967), the appellant's motion for a mistrial should have been granted.

This case now before this Honorable Court is easily distinguishable from the case of Alford v. State Farm Fire and Gas. Co., 496 So.2d 19 (Ala. 1986). In the Alford case, the court affirmed Deand and Parker but did not reverse the trial court for not granting the mistrial motion. First, the Alford opinion itself shows a lengthy answer by the appellant without objection. Second,

the opinion notes that "...Mr. Alford had 'previously testified' regarding this matter...". Neither of the grounds cited in Alford are present in this case.

NOW WHEREFORE, because of the trial court's failure to grant the appellant's mistrial based upon the prosecutorial misconduct of the State's prosecutor, the appellant's conviction must be reversed and the appellant's cause remanded to the trial court for a mistral.

IV.

THERE WAS INSUFFICIENT EVIDENCE ADDUCED AT TRIAL TO SUSTAIN A CONVICTION AS WELL AS A FAILURE OF THE STATE TO CARRY THE BURDEN OF PROOF WITH REGARD TO THE OFFENSE OF CAPITAL MURDER: THEREFORE, IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO DENY THE DEFENSE MOTION FOR A DIRECTED VERDICT OF ACQUITTAL AT THE CONCLUSION OF THE STATE'S CASE, AS WELL THE DEFENSE MOTION FOR A JUDGMENT OF ACQUITTAL AT THE CONCLUSION OF THE TRIAL.

The evidence introduced at the trial was purely circumstantial. Over one hundred years ago in Ex Parte Acree, 63 Ala. 234 (1879), the Supreme Court of Alabama discussed what was necessary in order to convict a person by use of circumstantial evidence as follows:

> The humane provisions of the law are, that a prisoner, charged with a felony, should not be convicted on circumstantial evidence, unless

> it shows by a full measure of proof that the Defendant is guilty. Such proof is always insufficient, unless it excludes to a moral certainty, every other reasonable hypothesis, but that of the guilty of the accused. Ex parte Acree no matter how strong these circumstances, if they can be reconciled with the theory that some other person may have done the act, then the Defendant is not shown to be guilty, by that full measure of proof which the law requires.

This is not an antiquated statement of the law however, as it has been followed throughout the years by the Supreme Court of Alabama, Dolvin v. State, 391 So.2d 133 (1980); Cumbo v. State, 368 So.2d 871 (1979).

Thus, if the circumstances can be reconciled with the theory that the appellant did not do the alleged act, then the conviction is due to be reversed. It is the appellant's

position that in the case now before this Honorable Court that the circumstances are such that capital murder was not committed by the appellant; and, therefore, the appellant's conviction must be reversed.

The appellant is alleged to have killed both a Mr. Pickens and a Mr. Bailey during the commission of a felony. Mr. Bailey was dead at the scene. However, Mr. Pickens, who was injured at the scene, died later. All of the State's evidence involves a black truck. However, Mr. Pickens stated that the person(s) who committed the offense were in a red vehicle, (R-772).

The appellant is black. However, when asked if the person(s) who shot him were black or white, Mr. Pickens stated they were white, (R-773).

On the testimony and circumstances as a whole one could and must conclude that the appellant did not commit the murders during the commission of a felony in this case; and, therefore, the appellant's conviction must be reversed.

NOW WHEREFORE, the appellant would pray this Honorable Court to reverse and render his conviction in the Circuit Court of Hale County, Alabama, or in the alternative to remand the case to the Circuit Court of Hale County, Alabama for a new trial and for

any further and other relief to which this Court may believe the appellant is entitled.

V.

THE DEATH PENALTY IMPOSED BY THE TRIAL COURT JUDGE IN THIS CAUSE SHOULD BE REVERSED.

Section 13A-5-53(a), Code of Alabama (1975) specifically mandates that if the appellant's conviction is upheld by this Honorable Court that this Honorable Court must then review the propriety of the death sentence. The appellant specifically does not in any manner by the inclusion of this issue within his brief stipulate that his conviction is a valid one. Rather, on the issues previously stated, the appellant specifically contends that

his conviction must be reversed. But, because of the applicable case law hereinabove cited, this issue is included within the appellant's brief.

The appellant's sentencing hearing was held before an advisory jury in accordance with Section 13A-5-46, Code of Alabama (1975). This sentencing hearing was held before the same jury that had heard all of the evidence in this case. The State's attorney specifically stated that they would attempt to show that only two aggravating circumstances existed, (R-858). The trial court instructed the jury that they were only to consider two aggravating circumstances, (R-883). The first aggravating circumstance was the incident which was

the basis of this case. The second aggravating circumstance had occurred 11 days before, (R-865). After hearing all of the evidence and testimony presented, the jury returned a vote of five for the death penalty (42%) while seven voted for life without parole (58%), (R-906).

While counsel fully recognizes that the jury verdict with 58% of the jurors favoring life without parole is advisory only, the only conclusion that can be reached in this case is that after weighing all of the evidence and testimony against the appellant involving the aggravating and mitigating circumstances, that the majority of the trial jury by a margin of 58% to 42%

found that the mitigating circumstances outweighed the aggravating circumstances.

In the highly unlikely event that his issue is ever given serious consideration by this Honorable Court since the appellant's case must be reversed on other grounds as previously stated, then this Honorable Court must reverse the appellant's death penalty and order the imposition of a life-without-parole sentence due to the trial court's refusal to give credence to any mitigating circumstance.

VI.

DEATH BY ELECTROCUTION AS APPLIED BY THE STATE OF ALABAMA CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHT AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND ARTICLE 1, SECTION 15 OF THE CONSTITUTION OF THE STATE OF ALABAMA.

Although the United States Supreme Court in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976), held that the penalty of death does not constitute cruel and unusual punishment where the death penalty is constitutionally applied. However, the constitutionality of the application goes not merely to the procedural application of the death penalty, but also into the nature in which the death penalty is carried out. The Alabama Supreme Court in Boykin v. State, 207

So.2d 412, 281 Ala. 559 (1968), held that the death penalty is cruel punishment when it involves torture or lingering death. Although the Alabama Supreme Court has clearly stated that for the death penalty not to be considered cruel and unusual punishment the method of death must result in a swift death and not a lingering death with undue pain and torture. Lee v. State, 227 Ala. 2, 150 So. 164 (Ala. 1933). Recent executions by the state have required more than one application of the electrical charge to be administered before the individual was declared dead. This failure to impose a swift death through the means of electrocution in the Alabama electric chair has been allegedly traced to faulty equipment and inexperienced executioners.

In the case of Jackson v. State, 516 So.2d 726 (Ala.Cr.App. 1985), the Court of Criminal Appeals cites the unpublished order entered June 3, 1983, by Judge Sam C. Pointer in the case of Raines v. Smith, Docket No. 83-P-1080-S (N.D. Ala.), stating that over a period of 50 years the Alabama electric chair had been used approximately 154 times with but one failure, that involving the multiple shocks needed to execute John Lewis Evans. However, since that time, there have been other instances where it has become necessary to repeatedly electrocute an individual in order to carry out the sentence of death.

NOW THEREFORE, the appellant, Victor Ramar Stephens, would pray this Honorable Court to declare the method

of death by electrocution as applied by the State of Alabama to be cruel and unusual punishment and to commute his sentence to life without parole.

CONCLUSION

The United States Constitution and the Alabama Constitution have been ruled by both the Alabama Supreme Court and the United States Supreme Court in Branch and Batson to prohibit prosecutorial misconduct by the State's attorney in the violation of a defendant's Due Process rights through the systematic exclusion of blacks from a jury where the defendant is black. In this case, it was conclusively shown that the first 21 of the State's 22 strikes were of blacks and your

appellant is black. Further, the appellant has shown that these strikes were for obvious racially discriminatory reasons such as "chewing gum" and "wearing sunglasses". Obviously, the State's attorney was simply "grasping at straws" in a flimsy attempt to justify what had previously been ruled to be a prima facie case of racial discrimination. There is no need for this Honorable Court to look further. The appellant's conviction must be reversed.

But, if the Court wishes to look further, there is obvious problems from the start, Batson, to the Court's reversal of the jury verdict of life without parole without the Court's consideration of any mitigating factor.

Further, although the granting of a motion for a mistrial will not be reviewed if it is within the clear discretion of the trial court, the comments made by the prosecutor were ineradicably prejudicial to the defendant, the failure of the Court to grant such motion is an abuse of discretion. In this case, the prosecutor during closing argument clearly stated to the jury that the counsel for the defendant was covering up evidence. Such a statement can only lead to the inference that the defense counsel has committed a crime in attempting to withholding evidence from the Court.

Although the Supreme Court of the United States has held that electrocution as a method of death, per

se, is not cruel and unusual punishment as barred by the Eighth Amendment of the Constitution of the United States, where the application of that punishment involves torture or lingering death such application does reach the level necessary for punishment be deemed both cruel and unusual. The State of Alabama has repeatedly been forced time after time to repeatedly apply an electrical shock to insure the death of an individual sentenced to death. Whether this delayed death by electrocution is the result of incompetency of the executioner or faulty equipment, it is the burden of the state to make sure that death by electrocution is both speedy and without undue pain or torture.

NOW WHEREFORE, the appellant, Victor Ramar Stephens, would pray this Honorable Court to vacate the sentence of the trial court or in the alternative, to commute his sentence from death to life without parole, or in the alternative, to remand this case to the trial court with instructions to grant the motion of the defense for a mistrial.

APPENDIX B

445 Dexter Avenue
Montgomery, AL 36130

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Telephone: 242-4609

Re: 1900032

Ex parte Victor R. Stephens
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Victor R. Stephens vs. State)

Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk Register granted additional time to file clerk's record/record on appeal to and including

_____ Appell_____ granted 7 additional days to file briefs to and including

_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

_____ Petition for Writ of Certiorari denied. No opinion.

XXXXX Application for rehearing overruled. No opinion written on rehearing.
Per Curiam - Hornsby, C.J., Maddox, Almon, Shores, Adams, Houston, Steagall and Ingram, JJ., concur.

_____ Permission to file amicus curiae briefs granted

_____

4/11/91
bsa

Robert G. Esdale, Clerk
Supreme Court of Alabama

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Supreme Court, U.S.
FILED
AUG 22 1991
OFFICE OF THE CLERK

(5)

No. 91-66

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

VICTOR STEPHENS,
Petitioner,

-against-

THE STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari
To The Supreme Court of Alabama

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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Counsel for Petitioner
Victor Stephens

August 22, 1991

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

No. 91-66

VICTOR STEPHENS,

Petitioner,

-against-

THE STATE OF ALABAMA,

Respondent.

Reply Memorandum on Petition for Writ of Certiorari To the Supreme Court of Alabama

Petitioner, Victor Stephens respectfully submits this memorandum in reply to the state's opposition to his request that a writ of certiorari be issued to review the decisions of the Supreme Court of Alabama affirming his convictions and death sentence and denying his motion for reconsideration of the same.

I. THE JURY OVERRIDE ISSUE

A. The Constitutional question has been preserved for review by this Court. As this Court recently held in *Ford v. Georgia*, __ U.S. ___, 111 S.Ct. 850 (1991): "In any given case... the sufficiency of... a rule to limit all review of a constitutional claim itself depends upon the timely exercise of the local power to set procedure." 111 S.Ct. at 857. Under this standard, and the applicable Alabama case law and statutes, and the prior decisions of this Court, the points raised in the petition for certiorari were all properly preserved in the state courts below.

The trial court's failure to apply standards in the course of imposing the death sentence and overriding of the jury's recommendation for life imprisonment, and the court's failure to state such standards so that its conduct could be properly assessed under appropriate constitutional guidelines, was plain error and a clear defect in the proceedings. As such, the court's decision is properly reviewable by this Court even if petitioner's counsel did not raise the point before the trial court. This issue was properly preserved due to application of Alabama appellate rules and case law, and, on an entirely independent ground, because it was specifically raised on petitioner's application for rehearing.

1. Upon application of Alabama Appellate Rules and case law. *Beck v. State of Alabama* 396 So.2d 645 (1981) is the case in which the Supreme Court of Alabama implemented the mandate of this Court set out in *Gregg v. Georgia*, 428 U.S. 153 (1976) for death penalty cases. Alabama added its own special variation in the *Gregg* procedure, however. (Some states in establishing their *Gregg* procedure have provided for a direct appeal to their highest court from their trial court when a death penalty is involved. As will be seen below, Alabama retains intermediate review, but statutory procedural rules and the *Beck* decision insure that the Alabama Supreme Court can review any plain error or defect in the proceeding, whether or not brought to the attention of the trial court.) In *Beck*, the Alabama Supreme Court noted that this procedure added "one more safeguard to insure that the death sentence is not being imposed arbitrarily or capriciously." 396 So.2d at 664. The court's holding in *Beck*, as it relates to the present issue, is as follows:

> In Alabama, a sentence of death is automatically reviewed by the Court of Criminal Appeals and, if affirmed, is then automatically reviewed on petition for certiorari by this Court. Rule 39(k), Alabama Rules of Appellate Procedure, provides:
>
> In all cases in which the death penalty has been imposed, upon review of the opinion of the court of criminal appeals on certiorari, the supreme court may notice any plain error

> or defect in the proceeding under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial rights of the petitioner. *Id.*

The Alabama Supreme Court made it clear that this "plain error" scope of review was applicable to death penalty cases only. *Id.*

In the instant case, petitioner complains of plain error and a defect in the proceeding under review in that the trial court applied no standards -- neither the *Tedder* standard nor any other -- in imposing the death sentence and overriding the jury's recommendation of life imprisonment. Under Alabama law, the requirement that such a point be brought to the attention of the trial court is unnecessary. The federal constitutional question is preserved by statute, without special mention below, for review by the state's highest court. And accordingly, it is preserved for review by this Court.

2. Upon application for rehearing. The jury override issue was explicitly raised by petitioner in his application for rehearing to the Supreme Court of Alabama (Petitioner's Appendix D at 86, 90-92.[1] While the respondent state does not quarrel with this assertion, it contends that the constitutional point has not been preserved "because the Supreme Court of Alabama summarily denied the application for rehearing without an opinion... [and that]... [s]uch a summary denial does not constitute a reviewable

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1. Under Alabama law, we believe that it was not necessary for Petitioner to raise this issue at all, as is more fully set out in Point A.1., above. However, as will be seen in the development of this point (A.2.), the authorities cited by respondent and applicable Alabama case law yield a second and independent ground for consideration of the jury override issue.

judgment," citing *Consolidated Turnpike Co. v. Norfolk & Co.*, 228 U.S. 326, 333-334 (1913). If the denial of the application for rehearing constituted a reviewable judgment, however, under *Herndon v. Georgia*, 295 U.S. 441, 443-444, as noted by respondent in its brief, the question would be properly preserved for review. Under Alabama law, contrary to respondent's contention, that is exactly what happened here.

It is important to review the exact holding in *Consolidated Turnpike Co. v. Norfolk & Oceanview Railway Company:*

> Nothing is better settled than that it is too late to raise a Federal question for the first time in a petition for a rehearing, *after the final judgment of the state court of last resort.* If, however, the state court actually entertains the petition and decides the Federal question, and this appears by the record, the requirement of § 709, that the right shall be specially set up and denied, is complied with. 228 U.S. at 334. (Emphasis supplied.)

The procedural consequences of applications for rehearing are established in Rules 40 and 41 of the Alabama Rules of Appellate Procedure. Under Rule 41(a), "the timely filing of an application for rehearing will stay the certificate of judgment until disposition of the application unless otherwise ordered by the Court." The Committee Comments in discussing the precedential value while the case is pending for review note that:

> While this rule stays the issuance of the certificate of judgment, and *postpones the final judgment between the parties*, it did not prevent a decision of the Court of Criminal Appeals from having precedential value while the case was pending for review. (Emphasis supplied.)

Thus, the judgment of the Supreme Court of Alabama, unlike the decision of the Supreme Court of Appeals of the State of Virginia in the *Consolidated* case, was not a final judgment. In *Grantham v. State* 540 So.2d 775 (1987), the Court of Criminal Appeals of Alabama, per Taylor, J., makes it clear that "[a] judg-

ment of this Court is not final until the certificate of judgment is issued". *Id.* at 777. Because the jury override issue was properly brought to the attention of the Supreme Court prior to final judgment, it was ripe for review there, as it is here.

3. At all events petitioner did raise the jury override issue in the Alabama courts. While it is undoubtedly true that petitioner did not raise this issue in the state courts with the degree of clarity and eloquence with which he would have done in an optimal situation, a review of the record reveals that he raised it at trial, App. D to the petition for certiorari at 57-59; that it appears to have been considered by the Alabama Court of Criminal Appeals, *see* App. B to the petition for certiorari at 33 and 36 (court can find no error involving the propriety of the death sentence); in petitioning for a writ of certiorari before the Alabama Supreme Court, App. D to the petition for certiorari at 70, 85; and in moving for reconstruction, App. D to the petition for certiorari at D-90-92. It is respectfully submitted that petitioner raised the issue in the state courts with sufficient specificity to give this court jurisdiction and to warrant this court's entertaining his petition.[2]

B. The trial court's failure to apply the *Tedder* standard or other significant safeguard requires review by this Court under the *Spaziano* decision. It is true, as respondent contends, that this Court decided in *Spaziano v. Florida* 468 U.S. 447, 465 (1984), that:

> If a judge may be vested with sole responsibility for imposing the penalty, then there is nothing constitutionally wrong with the judge's exercising that responsibility after receiving

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2. In this regard it is important to note that this Court has intimated that the requirement of raising all pertinent issues in the lower courts may be relaxed in death penalty cases. *See generally Caldwell v. Mississippi*, 472 U.S. 320, 328 (1985).

> the advice of the jury. The advice does not become a judgment simply because it comes from a jury.

In making this decision, however, this Court recognized "the significant safeguard" the *Tedder* standard affords a capital defendant in Florida (*Id.* at 465), and went on to say:

> We are satisfied that the Florida Supreme Court takes that standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role. See *Richardson v. State*, 437 So. 2d 1091 1095 (Fla. 1983); Miller v. State, 332 So. 2d 65 (Fla. 1976). Our responsibility, however, is not to second-guess the deference accorded by the jury's recommendation in a particular case, but to ensure that the result of the process is not arbitrary or discriminatory.

We submit that it is not enough for respondent to rely on the first part of the *Spaziano* decision quoted above, while ignoring the second part. There is a split among the only three states (Alabama, Florida and Indiana) which permit a judicial override of a jury recommendation of life imprisonment. At this time, Alabama is the only state in which the judge may override without specifying or applying standards of review. It is undoubtedly for this reason that, unlike the other substantive points set forth in its brief, respondent does not deny the certworthiness of the jury override issue.

This case poses for the Court the important question of whether it is necessary for the Alabama court to have imposed a "significant safeguard" such as the *Tedder* standard, which is presently afforded a capital defendant in Florida (and also in Indiana). We submit that petitioner in this case was not protected by the safeguard afforded the defendant in the *Spaziano* decision, and, further, that as a result of this failure the decision of the trial judge in sentencing was arbitrary[3] and discriminatory. Far from

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3. The arbitrariness of the trial court's procedure was discussed throughout

disposing of this case, the *Spaziano* decision only emphasizes why this Court must, we submit, review this case.

II. THE REASONABLE DOUBT ISSUE AS FRAMED IN CAGE V. LOUISIANA.

A. The Constitutional question has been preserved for review by this Court. Petitioner raised this point before the Alabama courts. App. D at 95-97 and 110. Moreover, the arguments set out above (under Point I.A.) apply equally here. But there is another, and we maintain a compelling reason, why the instant point was preserved for appeal before this Court. This Court decided *Cage v. Louisiana*, 59 U.S.L.W 3361, on November 13, 1990, after petitioner had filed his petition for certiorari to the Alabama Supreme Court,[4] thus precluding petitioner from raising the issue before then. That is why petitioner is requesting (as an alternate ground to reversal) that the case be remanded to the Alabama Supreme Court for further consideration in light of this Court's decision in *Cage*. If it was necessary under Alabama law for petitioner to preserve this point at all (see point I.A. above), then the point was so preserved by petitioner in his application for rehearing, the first brief filed by petitioner after this Court had decided *Cage*. Under *Herndon v. Georgia*, 295 U.S. 441, 444 (1935) a federal claim is timely when raised in a petition for rehearing, if that petition presented the first opportunity for raising it, as it did here. Respondent's argument (answering brief p.14) that petitioner might have raised the point earlier is, we maintain, without merit, since petitioner did raise the point in a timely fashion, and in a manner appropriate for submission of a new point, a petition for rehearing.

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our petition and specifically at footnote 8, p. 9 of the petition.

4. Petitioner filed his petition for writ of certiorari to the Supreme Court of Alabama on October 5, 1990. Respondent's brief in opposition at 14.

B. The point is certworty. In its response, respondent also argues that petitioner's argument as to the *Cage* jury instruction issue is not worth of certiorari because it requests no modification or clarification of the *Cage* decision, but only its straightforward application. As the petition for certiorari makes clear, however, petitioner is not asking this Court to exercise full appellate review on the basis of *Cage*, but rather, to vacate and remand to the Supreme Court of Alabama for further consideration in light of *Cage*. Petition for certiorari at 11-13. It is respectfully submitted that, in this context, the issue is worthy of certiorari.[5]

III. THE LESSER INCLUDED OFFENSE ISSUE. Our petition for certiorari (at point III) argues that this case should be remanded to the Alabama Supreme Court for further consideration based on this Court's recent decision in *Schad v. Arizona*, 59 U.S.L.W. 4762 (June 21, 1991) because the trial court failed to charge the jury on felony murder, which is a non-capital offense in Alabama. While this point has also been preserved on the basis of the reasons set forth above (at Point I), there is an independent ground here, as well. The point was specifically mentioned, and therefore preserved, before the trial court and again before the Alabama Supreme Court (see petition for certiorari at 14 n. 14 and App. D thereto at 137-38 and 92-95). Although the point was not raised before the Alabama Court of Criminal Appeals, it is submitted that this was not necessary under Rule 13(k) of the Alabama Rules of Criminal Appeals and for reasons cited in point A above.[6]

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5. Petitioner alternatively asks this court to consider summarily reversing his conviction. Petition for certiorari at 13 n.12. However, it follows that the issue is worthy of certiorari in this context as well, since such a summary reversal is precisely what this Court did in *Cage*.

6. The Court of Criminal Appeals did in fact search the record (per Beck v. State) and found no plain error or defect which might have adversely affected appellant's substantial rights. (App B at 36)

As with the *Cage* issue, the State of Alabama argues that petitioner's argument as to the *Schad v. Arizona* issue is not worthy of certiorari because it requests no modification or clarification of the *Schad* decision, but only its straightforward application. Again, as the petition for certiorari makes clear, petitioner is not asking this Court to exercise full appellate review on the basis of *Schad* but rather to vacate and remand to the Supreme Court of Alabama for further consideration in light of *Schad*.

Alabama's contention that petitioner's argument as to this issue is precluded by *Hopper v. Evans*, 456 U.S. 605 (1982) is also without merit. *Hopper* involved a perpetrator who testified he had intended to kill. 456 U.S. at 612-13. In the present case, by contrast, as discussed at pages 15-16 of the petition for certiorari, there was evidence that petitioner did not have the intent to kill, but acted in response to a shotgun blast, which wounded him.[7]

IV. THE BATSON ISSUES. Finally, respondent's argument that the *Batson v. Kentucky* argument is not worthy of certiorari is similarly without merit. While it is true that this Court, in *Hernandez v. New York*, 59 U.S.L.W. 4501 (May 28, 1991) held that the acceptance or rejection of a prosecutor's professed race neutral reasons for exercising his peremptory challenges is within the trial court's discretion, this Court has not had the opportunity to elaborate on what circumstances might constitute an abuse of discretion. It is respectfully submitted that the present case presents an excellent opportunity for this Court of do so.

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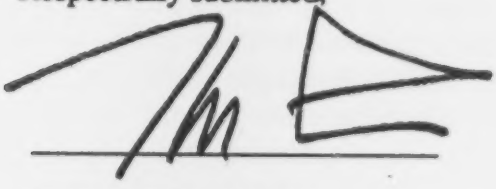
7. Because a shotgun pellet was found in the barrel of the .25 caliber pistol left at the scene, the trial judge concluded that the pistol was fired first. Based on the tone of the trial court's opinion, this finding infuriated the judge, causing his arbitrary conclusion that petitioner fired first and lied about it (App. C to the Petition at 6-7). Of course, the record indicates that the pistol was left at the scene of the crime -- perhaps thrown on a floor covered with shotgun pellets -- and the court's finding and its arbitrary imposition of the death penalty was unwarranted.

Conclusion

For the various reasons given, Victor Stephens' petition for certiorari should be granted.

Respectfully submitted,



August 22, 1991

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